Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCC-68–01 OF 2013
WONG KIAN KHEONG JC
30 MARCH 2016

Companies and Corporations — Winding up — Undue preference — Company under winding up paid salary and contributions due to its human resources manager in preference over its many other unpaid employees — Whether payments made during six months period prior to presentation of winding up petition were void/voidable under s 293(1) & (2)(a)(i) of the Companies Act 1965 read together with s 53(1) of the Bankruptcy Act 1967 — Whether manager legally bound to return payments he received to company's liquidators with interest — Whether payment of monies to manager an attempt to misappropriate company's funds and dissipate its assets

The plaintiffs were employees of the ninth defendant ('D9') and claimed the company, which was wound up by order of court on 16 January 2009, owed them a substantial amount in, inter alia, arrears of salaries. In their instant action, premised on s 304 (1) of the Companies Act 1965 ('the CA'), the plaintiffs claimed the defendants had carried on the business of D9 with intent to defraud its creditors, particularly the plaintiffs, and that the defendants should accordingly be held jointly and severally liable for all the debts and liabilities of D9 including the amount the company owed the plaintiffs. At all material times, the first defendant ('D1') was D9's executive managing director, the second to the sixth defendants were its directors, the seventh defendant ('D7') was the company's human resources manager while the eighth defendant was a shareholder in D9. At the end of the first trial of the suit before another High Court judge involving all the defendants, except D7, the court had, inter alia, declared that only D1 had carried on the business of D9 with intent to defraud its creditors, including the plaintiffs, under s 304 of the CA and therefore he was personally liable to settle the amounts owing to the plaintiffs with interest. The instant trial was only to determine whether D7 was liable. Prior to D9's winding up, another creditor of the company had, on the presentation of a separate winding up petition, obtained an ex parte order appointing two provisional liquidators ('PLs') for D9. On 12 September 2007, the order appointing the PLs was served on D9 and the PLs took possession of the company's factory. A day earlier, ie on 11 September 2007, D9 had issued three cheques for a total of RM160,000 in favour of D7 who cashed them the following day. The cheques were in payment of D7's salary and Employees' Provident Fund contributions. D7 claimed there was nothing improper about

his encashing the cheques contending that the cheques were a repayment of a RM161,200 loan he had made to D9. Among the issues in the instant trial against D7 were (a) whether after knowing that the PLs had been appointed for D9 it was dishonest of D7 to have cashed the three cheques; (b) whether the cashing of the cheques had dissipated the assets of D9 and was an undue preference in D7's favour, over the other unsecured creditors of the company, under s 293 of the CA; (c) whether D7 had knowingly been party to the carrying on of D9's business with intent to defraud D9's creditors, including the plaintiffs, under s 304(1) of the CA; and (d) whether D7 had conspired with the directors of D9 to injure the plaintiffs by lawful or unlawful means.

Held, ordering D7 to return the RM160,000 to the liquidators of D9 with interest thereon at 5%pa from 12 September 2007 until date of full payment:

(1) It was just and proper for the court to order D7 to return the RM160,000 (being monies that belonged to D9) to the liquidators of the company pursuant to the general prayer for relief in the reamended statement of claim ('the RSOC'). If otherwise, the undue preference rule would be rendered nugatory and D7 would be unjustly enriched by that amount. As the RSOC and the plaintiff's reply had pleaded in great detail the effect of the winding up issue, D7 could not claim to be caught by surprise by the prayer for D7 to pay the RM160,000 to the liquidators. An order to that effect was not inconsistent with the other prayers in the RSOC. In view of D7's dishonest dissipation of the RM160,000, the court exercised its discretion under s 11 of the Civil Law Act 1956 to award pre-judgment interest at 5%pa on the RM160,000 from 12 September 2007 (the date D7 encashed the three cheques) until date of judgment and thereafter with post-judgment interest at the same rate under O 42 r 12 of the Rules of Court 2012 until date of full payment (see paras 43, 62 & 65).

(2) As D7's encashment of the three cheques was done before the date of presentation of the second winding up petition (on 19 October 2007), it was not caught by s 223 of the CA. However, it constituted an 'undue preference' in D7's favour under s 293(1) and (2)(a)(i) of the CA read with s 53(1) of the Bankruptcy Act 1967 ('the BA') as the cheques were cashed during the six-month period prior to the presentation of the winding-up petition and, thus, was caught by the 'undue preference' rule. Due to his dishonest conduct, D7 could not rely on the 'bona fide purchaser for valuable consideration' exception in s 53(2) of the BA. In any event, he had failed to discharge the legal onus under s 106 of the Evidence Act 1950 ('the EA') to prove on balance of probabilities that he had acted in good faith in respect of the encashment of the three cheques (see paras 57 & 59).

(3) The court rejected D7's contention that he had given a RM161,200 loan to D9. That contention was credibly rebutted by contemporaneous documentary evidence in the form of the three payment vouchers of D9 which clearly stated that the three cheques were advances from D9 to D7. D7's conduct was also inconsistent with that contention: he did not inform the PLs about the alleged loan, he did not make a demand, nor file a proof of debt in the winding-up, for the balance RM1,200 supposedly owing to him. D7's claim that he had advanced money to D9 for 15 years was not borne out in the financial records and reports of D9 which was a public-listed company. Adverse inference under s 114(g) of the EA had to be drawn against D7 for not adducing documentary evidence to prove he had the financial means to make the alleged loan to D9. If the alleged loan was genuine and if D9 truly intended to repay the sum, it would have been sufficient for only one cheque to be issued in D7's name. The fact that three cheques were issued showed that both D7 and D9 had the dishonest intention to conceal the true nature of the payments, namely, D9 had actually made a preferential payment to D7 for his salary and EPF contribution. In view of D7's actual knowledge of the appointment of the PLs on the morning of 12 September 2007, by encashing the cheques in the evening of the very same day, D7 had acted dishonestly to dissipate the assets of D9 (see paras 37 & 40–41).

(4) In respect of the encashment of the three cheques, D7 had acted dishonestly vis-a-vis D9 but not vis-a-vis D9's creditors so as to attract the application of s 304(1) of the CA. The court was not satisfied that the plaintiffs had proven on balance of probabilities that D7 had knowingly been a party to the carrying on of D9's business on one or more of the three limbs of fraudulent trading. There was no evidence D7 was involved in the carrying on of D9's business; he did not deal with any of D9's customers, creditors, suppliers and bankers; he was not a director in D9's board of directors; he was only the company's HR manager (see paras 30 & 32).

(5) There was no evidence on balance of probabilities to prove that D7 had committed the tort of conspiracy to defraud or to injure the plaintiffs (see para 24).

[Bahasa Malaysia summary

Plaintif-plaintif adalah pekerja defendan kesembilan ('D9') dan mendakwa syarikat itu, yang telah digulung melalui satu perintah mahkamah pada 16 Januari 2009, berhutang sejumlah wang yang besar dengan mereka dalam, antara lain, tunggakan gaji. Dalam tindakan plaintif-plaintif ini, berasaskan s 304(1) Akta Syarikat 1965 ('AS'), plaintif mendakwa defendan telah menjalankan urusan D9 dengan niat menipu pemiutang, terutamanya plaintif-plaintif dan bahawa defendan-defendan harus bertanggungjawab secara bersama dan berasingan bagi segala hutang dan liabiliti D9 termasuk

jumlah terhutang oleh syarikat kepada plaintif-plaintif. Pada semua masa material, defendan pertama ('D1') ialah pengarah eksekutif pengurusan D9; defendan kedua hingga keenam ialah pengarahnya; defendan ketujuh ('D7') adalah pengurus sumber manusia syarikat manakala defendan kelapan adalah pemegang saham dalam D9. Pada perbicaraan pertama guaman di hadapan Hakim Mahkamah Tinggi lain yang melibatkan kesemua defendan, kecuali D7, mahkamah telah, antara lain, mengisytiharkan bahawa hanya D1 yang menjalankan urusan D9 dengan niat menipu pemiutang, termasuk plaintif, di bawah s 304 AS dan oleh itu dia bertanggungan sendiri untuk melunaskan hutang-hutang kepada plaintif-plaintif dengan faedah. Perbicaraan ini hanya untuk menentukan sama ada D7 bertanggungan. Sebelum D9 digulung, satu lagi pemiutang syarikat telah, melalui penyerahan petisyen penggulungan berasingan, memperoleh perintah ex-parte melantik dua pelidikuasi sementara ('PL') untuk D9. Pada 12 September 2007, perintah melantik PL telah diserahkan kepada D9 dan PL mengambil alih milikan kilang syarikat itu. Sehari sebelum itu, iaitu pada 11 September 2007, D9 telah mengeluarkan tiga keping cek berjumlah RM160,000 untuk D7 yang ditunaikan pada hari berikutnya. Cek adalah bagi tujuan bayaran gaji D7 dan caruman Kumpulan Wang Simpanan Pekerja. D7 mendakwa tiada apa-apa yang tidak wajar tentang penunaian cek tersebut dan menghujahkan bahawa adalah untuk bayaran semula pinjaman RM161,200 yang dibuatnya dengan D9. Antara isu-isu dalam perbicaraan terhadap D7 ini adalah (a) sama ada selepas mengetahui bahawa PL telah dilantik untuk D9, ia tidak jujur kepada D7 dengan menunaikan ketiga-tiga cek tersebut; (b) sama ada penunaian cek tersebut melenyapkan aset D9 dan merupakan keutamaan tidak patut memihak D7, melebihi pemiutang tidak bercagar lain syarikat itu, di bawah s 293 AS; (c) sama ada D7 sengaja menjadi pihak yang menjalankan perniagaan D9 dengan niat menipu pemiutang D9, termasuk plaintif, di bawah s 304(1) AS; dan (d) sama ada D7 berpakat dengan para pengarah D9 untuk menjejaskan plaintif dengan cara yang sah atau menyalahi undang-undang.

Diputuskan, mengarahkan D7 memulangkan RM160,000 kepada pelikuidasi D9 berserta faedah 5% setahun dari 12 September 2007 hingga tarikh bayaran penuh:

(1) Adalah adil dan wajar bagi mahkamah untuk memerintahkan D7 memulangkan RM160,000 (iaitu wang milik D9) kepada pelidikuasi syarikat menurut permohonan am bagi relief dalam penyata tuntutan terpinda ('RSOC'). Jika sebaliknya, peraturan keutamaan yang tidak wajar akan menjadi sia-sia dan D7 akan dikayakan dengan tidak adil dengan jumlah itu. Oleh kerana RSOC dan jawapan plaintif memplidkan dengan terperinci kesan isu penggulungan, D7 tidak boleh mendakwa dia dikejutkan permohonan agar D7 membayar RM160,000 kepada pelikuidasi. Satu perintah bagi maksud itu tidak konsisten

dengan permohonan lain dalam RSOC itu. Melihat pada pelupusan tidak jujur RM160,000 oleh D7, mahkamah menjalankan budi bicaranya di bawah s 11 Akta Undang-Undang Sivil 1956 untuk mengawardkan faedah pra-penghakiman pada kadar 5% setahun atas RM160,000 dari 12 September 2007 (tarikh D7 menunaikan tiga cek tersebut) sehingga tarikh penghakiman dan selepas itu dengan faedah selepas penghakiman pada kadar yang sama di bawah A 42 k 12 Kaedah-Kaedah Mahkamah 2012 hingga tarikh bayaran penuh (lihat perenggan 43, 62 & 65).

(2) Kerana penunaian tiga cek tersebut oleh D7 dilakukan sebelum tarikh penyampaian petisyen penggulungan kedua (pada 19 Oktober 2007), ia tidak dikekang oleh s 223 AS. Walau bagaimanapun, ia merupakan satu 'keutamaan tidak patut' memihak pada D7 di bawah s 293 (1) dan (2)(a)(i) AS dibaca bersama-sama dengan s 53 (1) Akta Kebankrapan 1967 ('BA') kerana cek-cek itu ditunaikan dalam tempoh enam bulan sebelum petisyen penggulungan dan oleh itu, dikekang oleh peraturan 'keutamaan tidak patut'. Akibat ketidakjujurannya, D7 tidak boleh bergantung pada pengecualian pembeli bona fide bagi balasan bernilai di bawah s 53 (2) BA. Dalam apa jua keadaan, dia gagal menunaikan tanggungjawab undang-undang di bawah s 106 Akta Keterangan 1950 ('AK') untuk membuktikan atas imbangan kebarangkalian bahawa dia telah bertindak dengan suci hati berkenaan penunaian tiga cek tersebut (lihat perenggan 57 & 59).

(3) Mahkamah menolak hujahan D7 bahawa dia telah diberi pinjaman RM161,200 untuk D9. Hujahan disangkal kuat oleh keterangan dokumen semasa dalam bentuk tiga bayaran baucar D9 yang menyatakan dengan jelas bahawa ketiga-tiga cek adalah pendahuluan daripada D9 kepada D7. Tindakan D7 juga selaras dengan hujahan tersebut: dia tidak memaklumkan kepada PL tentang pinjaman yang didakwa itu, dia tidak membuat tuntutan mahupun memfailkan bukti hutang dalam penggulungan, bagi baki RM1,200 yang didakwa terhutang padanya. Tuntutan D7 bahawa dia mendahulukan wang untuk D9 selama 15 tahun tidak terkandung dalam rekod-rekod kewangan dan laporan D9 yang merupakan sebuah syarikat awam tersenarai. Anggapan bertentangan di bawah s 114(g) AK perlu dibangkitkan terhadap D7 kerana tidak mengemukakan keterangan dokumentar untuk membuktikan dia mempunyai sumber kewangan untuk membuat pinjaman kepada D9. Jika pinjaman tersebut adalah tulen dan jika D9 benar-benar berniat membayar balik jumlah tersebut, adalah cukup jika hanya satu cek dikeluarkan atas nama D7. Hakikat bahawa tiga keping cek telah dikeluarkan menunjukkan bahawa kedua-dua D7 dan D9 mempunyai niat tidak jujur untuk menyembunyikan sifat sebenar bayaran, iaitu D9 sebenarnya telah membuat bayaran terpilih kepada D7 bagi gaji dan sumbangan KWSP.

Melihat pada pengetahuan sebenar D7 tentang pelantikan PL pada pagi 12 September 2007, dengan menunaikan cek pada petang hari yang sama, D7 telah bertindak tidak jujur dengan melesapkan aset D9 (lihat perenggan 37 & 40–41).

(4) Berhubung penunaian tiga cek tersebut, D7 telah bertindak secara tidak jujur dengan D9 tetapi bukan dengan pemiutang D9 untuk membangkitkan permohonan di bawah s 304(1) AK. Mahkamah tidak berpuas hati bahawa plaintif telah membuktikan atas imbangan kebarangkalian bahawa D7 sengaja menjadi satu pihak dalam perniagaan D9 pada salah satu atau lebih daripada tiga cabang penipuan dagangan. Tidak ada keterangan D7 terlibat dalam penjalanan perniagaan D9; dia tidak berurusan dengan mana-mana pelanggan, pemiutang, pembekal dan bank-bank D9; dia bukan seorang pengarah dalam lembaga pengarah D9; dia hanyalah pengurus sumber manusia syarikat (lihat perenggan 30 & 32).

(5) Tiada keterangan, atas imbangan kebarangkalian, untuk membuktikan bahawa D7 telah melakukan tort konspirasi untuk menipu atau menjejaskan plaintif (lihat perenggan 24).]

Notes

For cases on undue preference, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 2030–2035.

Cases referred to

Aktieselskabet Dansk Skibsfinansiering v Brothers and ors [2001] 2 BCLC 324 (refd)

Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad and another [2004] 1 SLR 234, HC (refd)

Attorney-General v Blake Jonathan Cape Ltd (third party) [1998] 2 WLR 805, CA (refd)

Au Meng Nam & Anor v Ung Yak Chew & Ors [2007] 5 MLJ 136; [2007] 4 CLJ 526, CA (refd)

Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, Deceased) v Pacific & Orient Insurance Co Sdn Bhd [1999] 1 MLJ 303, CA (folld)

Commercial Banking Co of Sydney Ltd v George Hudsons Pty Ltd (in liquidation) (1973) 131 CLR 605; [1973] 2 ALR 1, HC (refd)

Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd & Anor [2013] 7 MLJ 437, HC (refd)

Guan Teik Sdn Bhd v Haji Mohd Noor Haji Yakob & Ors [2000] 4 MLJ 433; [2000] 4 CLJ 324, CA (folld)

Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd [1991] 1 MLJ 33, SC (folld)

Kredin Sdn Bhd v Development & Commercial Bank Bhd [1995] 3 MLJ 304, CA (refd)

Kuwait Oil Tanker Co SAK and another v Al Bader and others [2000] 2 All ER (Comm) 271, CA (refd)
Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors [1988] 2 MLJ 449, SC (folld)
Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156; [1982] CLJ (Rep) 190, FC (refd)
Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David [2008] 5 SLR 663, CA (refd)
Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors [2014] 1 LNS 640, HC (refd)
Munusamy v Public Prosecutor [1987] 1 MLJ 492, SC (refd)
Ong Chat Pang & Anor v Valliappa Chettiar [1971] 1 MLJ 224, FC (refd)
Pentadbir Tanah Daerah, Pontian & Ors v Ossons Ventures Sdn Bhd [2009] 6 MLJ 182; [2009] 6 CLJ 713, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & other appeals [2010] 5 MLJ 394, CA (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393, CA (refd)
Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation) [1998] 4 MLJ 569, FC (folld)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd and another appeal [2014] 1 MLJ 49, CA (refd)
Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd [2015] 5 MLJ 1; [2015] 5 AMR 497, FC (refd)
Siow Yoon Keong v H Rosen Engineering BV [2003] 4 MLJ 569, CA (refd)
Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart [2012] 4 SLR 308, CA (refd)
Subry bin Hamid v Husaini bin Tan Sri Ikhwan [2006] 6 MLJ 229; [2006] 5 AMR 644, CA (folld)
Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261; [1996] 2 CLJ 771, CA (refd)
Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1; [2010] 2 CLJ 269, FC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)

Legislation referred to

Bankruptcy Act 1967 ss 53, 53(1) (2)
Civil Law Act 1956 s 11
Companies Ordinance [HK] s 275(1)
Companies Act 1965 ss 16(5), 219(2) 223, 293, 293(1), (2), (2)(a)(i), 304, 304(1), (5), (6)
Evidence Act 1950 ss 8(1), (2), 101(1), (2), 102, 106, 114(g)
Penal Code ss 193, 199, 200, 403
Rules of Court 2012 O 18, O 18 r 11, O 34 r 2(2)(c), 2(2)(k), O 42 r 12, O 56 r 1(1)

A Statutory Declarations Act 1960 s 3

Eric Tan Choon Heong (Emily Wong Li Yan with him) (Ong Kok Bin & Co) for the plaintiffs

Rajindar Singh s/o Kaher Singh (Clinton Nicholas Gomez with him) (Rajindar Singh Veriah & Co) for the seventh defendant

B

Wong Kian Kheong JC

A. INTRODUCTION

C

[1] This judgment discusses, among others, the following five questions:

(a) whether the seventh defendant, the human resources ('HR') manager of the ninth defendant company, had conspired with the ninth defendant's directors, to injure the 83 plaintiffs in this case ('the plaintiffs'), by unlawful or lawful means;

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(b) whether the seventh defendant was knowingly a party to the carrying on the business of the ninth defendant with intent to defraud the ninth defendant's creditors, including the plaintiffs, under s 304(1) of the Companies Act 1965 ('the CA');

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(c) whether the seventh defendant had dissipated the assets of the ninth defendant, by encashing three cash cheques issued by the ninth defendant ('three cheques');

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(d) whether the seventh defendant as the ninth defendant's employee had the following duties owed to the ninth defendant:

(i) implied contractual duties of fidelity and good faith; and/or

(ii) fiduciary duty.

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whereby the seventh defendant should not have any business outside the seventh defendant's employment; and

(e) whether the seventh defendant's encashment of three cheques constituted an undue preference in the seventh defendant's favour under s 293 of the CA in view of the winding up of the ninth defendant.

H

B. THIS ACTION

[2] The plaintiffs in this case were the employees of the ninth defendant. The plaintiffs had filed this suit against the following parties ('this suit'):

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(a) the first defendant ('the first defendant') was at the material time the executive managing director ('MD') of the ninth defendant and was effectively in control of the ninth defendant. The first defendant is an Indian national who resides in Malaysia;

(b) the second to sixth defendants were the ninth defendant's directors at the material time. The second to fourth defendants are Indian citizens who reside in India. The fifth and sixth defendants are Malaysian citizens who reside in Malaysia;

(c) the seventh defendant is a Malaysian citizen who resides in Malaysia;

(d) the eighth defendant is a company incorporated in India and holds 15.73% shareholding in the ninth defendant; and

(e) the ninth defendant was listed on the Second Board of Bursa Malaysia ('Bursa') on 17 December 1997.

[3] In the reamended statement of claim ('the RSOC'), the plaintiffs alleged, among others, as follows:

(a) at the material time, the ninth defendant carried out the business of manufacturing and sale of yarn. The ninth defendant owed a total of RM2,910,201.78 to the plaintiffs in terms of, among others, arrears of salary due to the plaintiffs ('alleged debt to plaintiffs');

(b) this suit was brought pursuant to s 304 of the CA whereby the plaintiffs averred that the first to ninth defendants ('the defendants') had carried on the business of the ninth defendant with intent to defraud the creditors of the ninth defendant. The plaintiffs claimed that the plaintiffs are the ninth defendant's creditors in view of the alleged debt due to plaintiffs. The particulars of the claim of each of the plaintiffs were set out in the Second Schedule to the RSOC;

(c) the plaintiffs also alleged that the defendants has unlawfully conspired with each other with the sole or pre-dominant purpose to injure the plaintiffs, by unlawful or lawful means; and

(d) the plaintiffs prayed for the following relief:

(i) a declaration that the ninth defendant's business had been carried on by the defendants with intent to defraud the ninth defendant's creditors, in particular the plaintiffs, pursuant to s 304 of the CA;

(ii) a declaration that the defendants shall be jointly and/or severally liable and personally responsible, without any limitation of liability, for all the debts of the ninth defendant;

(iii) an order for the defendants to jointly and/or severally pay to the plaintiffs the outstanding debt due and owing to the plaintiffs by the ninth defendant as pleaded in the Second Schedule to RSOC;

(iv) general damages to be assessed by this court;

(v) interest at the rate of 5%pa from 16 January 2009, the date of the ninth defendant's winding up by the Kuala Lumpur High Court

('winding up order'), on the sum ordered to be paid by this court until full settlement of the sum;

(vi) costs of this suit on a solicitor and client basis; and

(vii) further order and/or other relief which this court may deem fit and fair in the circumstances of this case.

B(1). First trial of this suit ('first trial')

[4] The plaintiffs entered a judgment in default of appearance against the seventh defendant on 29 May 2013 (default judgment against seventh defendant). Hence, the plaintiffs proceeded with the first trial against the first to sixth, eighth and ninth defendants before Nallini Pathmanathan J (as she then was).

[5] On 13 June 2014, after the first trial, Nallini Pathmanathan J decided as follows in *Muniandy a/l Nadasan & Ors v Dato' Prem Krishna Sahgal & Ors* [2014] 1 LNS 640 ('decision of first trial'):

(a) the plaintiffs were entitled to a declaration that the ninth defendant's business had been carried on by the first defendant with intent to defraud the ninth defendant's creditors, including the plaintiffs, pursuant to s 304 of the CA;

(b) the plaintiffs are granted a declaration that the first defendant is personally liable to the ninth defendant's employees and is hereby ordered to pay the outstanding debt due and owing to the plaintiffs in the sum of RM2,910,201.78 ('the sum') as set out in the Second Schedule to RSOC;

(c) the plaintiffs are granted interest at the rate of 5%pa on the sum from the date of judgment to the date of final settlement of the sum, payable by the first defendant;

(d) no declaration is granted under s 304 of the CA in respect of the second to sixth, eighth and ninth defendants;

(e) an order that all payments channelled to the eighth defendant which amounted to fraudulent preference as stated in the decision of first trial, are hereby declared void;

(f) an inquiry or assessment by the ninth defendant's liquidator for an account of monies siphoned or channelled to the eighth defendant by the first defendant;

(g) an order for the repayment by the eighth defendant of monies wrongfully channelled to or dissipated by the first defendant to the

eighth defendant to be made to the ninth defendant's liquidator for distribution among the ninth defendant's body of unsecured creditors in accordance with the law; and

(h) costs of RM120,000 be paid by the first defendant to the plaintiffs.

[6] The first and eighth defendants had appealed to the Court of Appeal against the decision of first trial. On 30 December 2015, the Court of Appeal had:

(a) dismissed the first defendant's appeal with costs ('Court of Appeal's judgment (first defendant)); and

(b) allowed the eighth defendant's appeal with costs ('Court of Appeal's judgment (eighth defendant)).

I will refer to the above judgments of the Court of Appeal later in this judgment.

B(2). Second trial of this suit ('second trial')

[7] The seventh defendant applied to set aside the default judgment against seventh defendant (seventh defendant's application). On 20 March 2015, the learned senior assistant registrar allowed the seventh defendant's application with costs and set aside the default judgment against seventh defendant ('SAR's decision').

[8] The plaintiffs appealed to me against the SAR's decision ('plaintiffs' appeal') under O 56 r 1(1) of the Rules of Court 2012 ('the RC'). On 18 May 2015, I dismissed the plaintiffs' appeal with costs. As such, the plaintiffs proceeded before me with the second trial of this suit only against the seventh defendant.

[9] In the second trial:

(a) the plaintiffs called two witnesses, namely:

(i) Mr Michael a/l Thomas ('PW1'); and

(ii) Mr Alok Kumar Sarda ('PW2').

(b) the seventh defendant testified at the second trial and did not call any other witness.

C. THE PLAINTIFFS' CASE

[10] I start with PW2's evidence because such evidence will set out the circumstances regarding the ninth defendant's winding up. PW2 gave the following evidence, among others, in PW2's witness statement:

(a) PW2 is a director in a company incorporated in Singapore, Vaaibz Pte Ltd ('VPL');

(b) VPL is a trade creditor of the ninth defendant;

(c) on 13 August 2007, VPL presented a winding up petition against the ninth defendant in the Seremban High Court ('the first winding up petition'). In the first winding up petition, on 6 September 2007, VPL obtained on an ex parte basis the appointment of Mr Ong Kong Lai ('Mr Ong') and Mr Wong Cham Mew ('Mr Wong') as provisional liquidators ('PLs') of the ninth defendant ('first order appointing PLs');

(d) on 12 September 2007:

(i) the first order appointing PLs had been served on the ninth defendant; and

(ii) the PLs took possession of the ninth defendant's factory in Senawang Industrial Estate, Negeri Sembilan ('factory);

(e) the ex parte appointment of the PLs had been set aside on an ex parte basis by the ninth defendant on 19 September 2007;

(f) on 19 October 2007, Vearrian Tanzania Ltd ('VTL') presented a second winding up petition against the ninth defendant in the Kuala Lumpur High Court. In the second winding up petition, VTL obtained an order from the winding up court on 23 April 2008 to appoint Mr Ong and Mr Wong as PLs of the ninth defendant (second order appointing PLs);

(g) on 16 January 2009, a winding up order of the ninth defendant was made by the Kuala Lumpur High Court. Mr Ong and Mr Wong had been appointed by the High Court to be the liquidators of the ninth defendant on 4 February 2009 ('liquidators');

(h) the PLs prepared the following reports in respect of the ninth defendant:

(i) a preliminary report for the period from 6 September 2007–18 September 2007 ('PLs first preliminary report'); and

(ii) a preliminary report for the period from 23 April 2008–21 July 2008 ('PLs second preliminary report');

(i) the PLs had appointed Twin Leaders Corporate Services Sdn Bhd ('TLCS') to do a forensic investigation regarding the ninth defendant. TLCS had prepared the following reports:

(i) a forensic investigation preliminary report as at 21 September 2007 ('TLCS's first report');

(ii) a forensic investigative report as at 24 November 2008 ('TLCS's second report); and

(iii) a forensic investigative report as at 27 November 2009 ('TLCS's third report');

(j) on 11 September 2007, the ninth defendant issued the three cheques as follows:

(i) Malayan Banking Bhd ('MBB') cheque No 704992 for the sum of RM50,000 (first cheque);

(ii) MBB Cheque No 704993 for the sum of RM50,000 (second cheque); and

(iii) EON Bank Bhd (EON) Cheque No 159282 for the sum of RM60,000 (third cheque); and

(k) there were three payment vouchers ('PV's') of the ninth defendant which showed that the sum totalling RM160,000 as stated in the three cheques constituted advances from the ninth defendant to the seventh defendant.

[11] During PW2's cross-examination, PW2 testified, among others:

(a) VPL is PW2's company which supplied raw materials to the ninth defendant in September 2005;

(b) PW2 disagreed with the seventh defendant's learned counsel that the seventh defendant had no part to play in the administration of the ninth defendant. According to the PW2, TLCS's first report showed that the seventh defendant assisted the PLs when the PLs took possession of the ninth defendant's office and factory;

(c) PW2 stated that PW2 was not aware that the seventh defendant had fraudulently carried out the ninth defendant's business to defraud the ninth defendant's creditors;

(d) PW2's testimony in this case is based solely on documents prepared by TLCS of which PW2 had no personal knowledge; and

(e) PW2 agreed with the seventh defendant's learned counsel that PW2 had no personal knowledge of the withdrawal of monies belonging to the ninth defendant.

[12] In PW1's witness statement ('WSSP1'), PW1 testified, among others, as follows:

(a) PW1 was a 'raw material clerk' with the ninth defendant. PW1 had worked for seven years for the ninth defendant;

(b) PW1's scope of work was as follows:

(i) PW1 was in charge of receipt and storage of raw materials for the ninth defendant;

(ii) PW1 participated in the annual physical 'stock take' by the ninth defendant's auditor; and

(iii) PW1 prepared a daily stock report to Ms Vicky, the personal secretary to the first defendant, and a monthly report for reconciliation;

(c) in April 2007, there was very little production of yarn by the ninth defendant due to a shortage of supply of raw materials to the ninth defendant;

(d) the ninth defendant had deducted seven months' contributions for the Employees Provident Fund ('EPF') from PW1's salary but the ninth defendant did not remit such deductions to the EPF. PW1 together with other senior employees of the ninth defendant had lodged complaints with the EPF, Bursa and police regarding the ninth defendant's failure to remit EPF contributions to the EPF;

(e) PW1 continued to work for the ninth defendant despite no production of yarn by the ninth defendant because the first defendant as the ninth defendant's MD had assured the ninth defendant's employees that the ninth defendant would get a new investor and the ninth defendant would then be able to pay the salaries of the ninth defendant's employees;

(f) PW1 was present when the seventh defendant called for a meeting of the ninth defendant's board of directors ('BOD') to inform the ninth defendant's BOD that the ninth defendant had been served with the first order appointing PLs at approximately 9–9.15 am, 12 September 2007. PW1 was present because the seventh defendant had asked PW1 to submit PW1's report in respect of the raw materials to Ms Vicky which was part of PW1's daily routine. PW1 was outside the board room where the ninth defendant's BOD meeting was held. The door to the board room was opened and PW1 heard the seventh defendant informing the ninth defendant's BOD meeting that the first order appointing PLs had been received by the seventh defendant in the morning of 12 September 2007; and

(g) PW1 was told by the ninth defendant through three memoranda dated 30 April 2008, 10 May 2008 and 18 May 2008 ('three memoranda') to go on his annual leave. By a letter dated 13 June 2008, the PLs gave an extension of leave to PW1. PW1's salary had not been paid since April 2008.

[13] When PW1 was cross-examined, PW1 gave the following evidence, among others:

(a) although para 19.1 RSOC pleaded that the defendants (including the seventh defendant) were aware that the ninth defendant had been insolvent and had ceased to be a going concern since 2003, PW1 did not know of such a fact;

(b) PW1 had 'no idea' how the seventh defendant had engaged in and/or carried on the ninth defendant's business fraudulently by misleading the ninth defendant's employees, creditors, investors and Bursa with irregular accounting and financial transactions as pleaded in para 19.3 RSOC;

(c) PW1 had also 'no idea' regarding the allegation in para 19.4 RSOC that the defendants (including the seventh defendant) had siphoned and/or misappropriated assets of the ninth defendant to the detriment of the ninth defendant's employees and unsecured creditors;

(d) PW1 did not understand the averment in para 19.5 RSOC that although the ninth defendant was insolvent, the defendants (including the seventh defendant) had caused the ninth defendant to settle the ninth defendant's debts with preferred creditors of the ninth defendant. PW1 further testified that generally, PW1 did not understand the RSOC;

(e) PW1 did not know the meaning of the word 'conspiracy';

(f) PW1 admitted that PW1 had no evidence to prove the following allegations pleaded in RSOC:

(i) the seventh defendant had engaged, carried on and/or undertaken the business of the ninth defendant with intent to defraud the ninth defendant's creditors;

(ii) the seventh defendant had engaged, carried on and/or undertaken the business of the ninth defendant by settling the ninth defendant's debts with the ninth defendant's preferred creditors;

(iii) the seventh defendant had overstated the ninth defendant's revenue;

(iv) the seventh defendant had dissipated the ninth defendant's assets;

(v) the seventh defendant had participated in the irregularities regarding the ninth defendant's efforts to recover debts due to the ninth defendant; and

(vi) the seventh defendant had committed criminal breach of trust ('CBT').

(g) PW1 stated that all the plaintiffs were creditors of the ninth defendant but PW1 could not show any evidence to prove such a fact when PW1 was cross-examined by the seventh defendant's learned counsel. PW1 also admitted that PW1 had no evidence to prove the sum claimed in this suit; and

(h) regarding 12 September 2007:

(i) PW1 admitted that PW1 had no documentary proof that PW1 was present at the ninth defendant's office at 9am;

(ii) PW1 testified that PW1 was not the ninth defendant's director;

(iii) PW1 disagreed with the seventh defendant's learned counsel that the seventh defendant was not present at the ninth defendant's office;

(iv) PW1 agreed with the seventh defendant's learned counsel that PW1 did not speak to the seventh defendant;

(v) PW1 admitted that the seventh defendant had nothing to do with the shortage of raw material in the ninth defendant;

(vi) PW1 insisted that the seventh defendant played a part in the ninth defendant failure to remit EPF contributions for ninth defendant's employees because the seventh defendant was the ninth defendant's HR manager. PW1 however agreed that the seventh defendant was not legally responsible to pay the EPF contributions for ninth defendant's employees. Furthermore, PW1 did not know that the ninth defendant did not pay the seventh defendant's EPF contribution; and

(vii) PW1 admitted that in WSSP1 there was a contradiction in WSSP1 in respect of when the first order appointing PLs was served on the ninth defendant.

[14] In PW1's re-examination, PW1 clarified as follows, among others:

(a) the claim against the seventh defendant concerned the three cheques which had been encashed by the seventh defendant;

(b) PW1 made a mistake in WSSP1 regarding the date when the first order appointing PLs was served on the ninth defendant. PW1 confirmed that the first order appointing PLs was served on the ninth defendant on 12 September 2007;

(c) PW1 was in the ninth defendant's office on 12 September 2007 to give PW1's daily stock report to Ms Vicky, the first defendant's secretary. That was when PW1 saw the seventh defendant at the ninth defendant's office on 12 September 2007; and

(d) PW1 testified that PW1 had filed a proof of debt ('POD') with the liquidators regarding PW1's salary and EPF contributions.

D. SEVENTH DEFENDANT'S CASE

[15] The seventh defendant gave the following evidence, among others, in the seventh defendant's witness statement ('WSSD1'):

(a) the seventh defendant commenced work with the ninth defendant on 2 June 1990. At the material time the seventh defendant was the ninth defendant's HR manager. The seventh defendant had never been appointed as a director of the ninth defendant;

(b) the seventh defendant knew all the plaintifffs as the plaintiffs were the seventh defendant's colleagues in the ninth defendant;

(c) the seventh defendant had 'never been involved in the management' of the ninth defendant;

(d) the seventh defendant became aware of the first appointment of the PLs when the PLs together with court officers arrived at the ninth defendant's premises at about 3pm, 12 September 2007. The first order appointing PLs was set aside on 19 September 2007 and the ninth defendant 'functioned as normal';

(e) the salaries of the ninth defendant's employees were paid in full by the ninth defendant up to April 2008;

(f) the seventh defendant denied, among others:

(i) liability for the sum;

(ii) carrying on the ninth defendant's business to defraud the ninth defendant's creditors;

(iii) being either a party to or being aware of the fact that on 6 June 2007, the ninth defendant was listed under Bursa's Practice Note 17/2005 ('PN 17');

(iv) being aware that for the ninth defendant's financial year ending 31 December 2006, the ninth defendant had suffered

a nett loss of RM19,016,215 and that the ninth defendant's current liabilities were RM101,414,548;

(v) being aware that on 31 May 2007, the ninth defendant had announced the ninth defendant's quarterly financial report to Bursa which showed that the ninth defendant had suffered a loss of RM4,424,000 for the first quarter ending 31 March 2007;

(vi) being aware of the forensic investigation conducted by TLCS. Nor was the seventh defendant aware of TLCS's first, second and third reports;

(vii) being aware of fictitious invoices issued by the ninth defendant in 2007;

(viii) being aware of irregularities arising from transactions between the ninth defendant and MTI (Far East) Sdn Bhd;

(ix) being aware of irregularities in respect of the ninth defendant's valuation of plant and machinery;

(x) being a party to any conspiracy to defraud anyone;

(xi) being aware that the first to sixth defendants had caused the ninth defendant not to remit the plaintiffs' EPF contributions despite the fact that the ninth defendant had deducted EPF contributions from the plaintiffs' salaries;

(xii) the ninth defendant had been insolvent and ceased to be a going concern since 2003;

(xiii) the seventh defendant together with the other defendants had siphoned and/or misappropriated the assets of the ninth defendant; and

(xiv) the ninth defendant had settled the ninth defendant's debts with preferred and/or related creditors

on the following grounds:

(xv) the seventh defendant was only an employee of the ninth defendant;

(xvi) the seventh defendant was not involved in the ninth defendant's management;

(xvii) the plaintiffs were not creditors of the ninth defendant up to 23 April 2008 as the plaintiffs' salaries had been paid in full by the ninth defendant up to April 2008; and

(xviii) the plaintiffs' claim only arose in April 2008 after the second

Order Appointing PLs and when the plaintiffs' salaries had not been paid by the PLs;

(g) the ninth defendant had paid yearly rental of RM144,000 to Golden Privilege Sdn Bhd ('GPSB') from 2000–2006 ('ninth defendant's rental payments to GPSB'):

(i) the seventh defendant was aware of the ninth defendant's rental payments to GPSB but the seventh defendant claimed that seventh defendant did not receive a sen of the ninth defendant's rental payments to GPSB;

(ii) the seventh defendant stated that the seventh defendant was not a shareholder of GPSB. According to the seventh defendant, GPSB was not involved in any business activity. The seventh defendant did not receive any director's fee or dividend from GPSB;

(iii) the ninth defendant's rental payments to GPSB were made because there was an arrangement between the first and ninth defendants; and

(iv) the seventh defendant was not aware that:

(1) GPSB had no property to let to the ninth defendant. The seventh defendant was asked by the first defendant to affirm a statutory declaration ('SD') that GPSB had no property and such a SD was false because GPSB had two pieces of land ('false SD regarding GPSB's assets') — please see the press release dated 2 August 2011 by the Companies Commission of Malaysia ('SSM'), bundle CBD 6, at p 1845 (SSM's press release). However, the seventh defendant claimed that the seventh defendant did not know about the false SD regarding GPSB's assets. The seventh defendant was called by SSM but no action had been taken by SSM against the seventh defendant. SSM however took action against the first defendant whereby the first defendant was charged in the sessions court and was fined RM40,000 (six months' imprisonment in default of payment of fine);

(2) there was no tenancy agreement between the ninth defendant and GPSB; and

(3) there was no resolution from the ninth defendant's BOD and shareholders to approve the related party transaction regarding the tenancy between the ninth defendant and GPSB;

(h) regarding the three cheques:

(i) the seventh defendant alleged that on or about 15 September 2006, the seventh defendant paid a sum of RM79,200 to the Immigration Department at the request of the ninth defendant in respect of levies for the ninth defendant's foreign workers. On 15 September 2006, the seventh defendant withdrew cash amounting to RM79,200 from the seventh defendant's bank account and used this sum to apply for a bank draft from RHB Bank Bhd ('RHB') for that amount to be paid to the Immigration Department. The seventh defendant adduced a 'remittance application' form of RHB regarding the application for a bank draft from RHB for the amount of RM79,200 ('RHB's remittance application');

(ii) on 12 October 2006, the seventh defendant advanced RM82,000 to the ninth defendant by paying such a sum directly into the ninth defendant's bank account in MBB. The seventh defendant relied on two MBB's deposit slips dated 12 October 2006 which showed cash deposits of RM70,000 and RM12,000 deposited into the ninth defendant's bank account in MBB on 12 October 2006 ('two MBB's deposit slips');

(iii) the seventh defendant averred that the seventh defendant had advanced a total sum of RM161,200 to the ninth defendant (alleged loan of RM161,200 (from seventh defendant to ninth defendant);

(iv) the seventh defendant received the three cheques on 11 September 2007 as a repayment of the alleged loan of RM161,200 (from seventh defendant to ninth defendant). The seventh defendant was not aware who were the signatories of the three cheques;

(v) the seventh defendant had encashed the three cheques on 12 September 2007 and at the time of encashment of the three cheques, the seventh defendant was not aware of the first order appointing PLs. The seventh defendant claimed that the seventh defendant only became aware of the first order appointing PLs after:

(1) the seventh defendant had encashed the three cheques; and

(2) the seventh defendant had returned to the ninth defendant's premises 'shortly after 3pm' on 12 September 2007. The seventh defendant alleged that the PLs only entered the ninth defendant's premises at about 3pm, 12 September 2007.

(vi) a police report had been made against the seventh defendant in respect of the three cheques. The seventh defendant had given an explanation to the police and no action had been taken against the seventh defendant; and

(i) the seventh defendant gave evidence that like the plaintiffs, the seventh defendant did not receive any salary from the ninth defendant.

[16] During cross-examination, the seventh defendant testified, among others, as follows:

(a) the seventh defendant did not know that the PLs came to the ninth defendant's premises in the morning of 12 September 2007. According to the seventh defendant, the seventh defendant only came to the ninth defendant's premises after 3pm, 12 September 2007;

(b) the seventh defendant stated that most of the seventh defendant's job concerned work outside the ninth defendant's premises. After performing the seventh defendant's job, the seventh defendant would go to the bank;

(c) for the three cheques:

(i) the seventh defendant went to MBB and EON in the morning of 12 September 2007 to encash the three cheques. However, when the plaintiffs' learned counsel showed to the seventh defendant, EON's 'debit advice' dated 12 September 2007 from ('EON's debit advice dated 12 September 2007') which stated that the sum stated in the third cheque had been debited from the ninth defendant's account with EON at 3.37pm, 12 September 2007, the seventh defendant agreed that the seventh defendant had presented the third cheque in the evening of 12 September 2007! The seventh defendant however subsequently disagreed that seventh defendant was not in EON in the morning of 12 September 2007;

(ii) MBB and EON are near to each other and are within walking distance. MBB and EON are approximately 4km from the factory;

(iii) the seventh defendant disagreed with the plaintiffs' learned counsel that the seventh defendant encashed the three cheques despite knowing the appointment of the PLs; and

(iv) the seventh defendant was aware at the time of encashment of the three cheques that the seventh defendant should not encash the three cheques if PLs had been appointed over the ninth defendant;

(d) the seventh defendant was not aware that despite the setting aside of the first order appointing PLs, any money could only be taken out from the ninth defendant with the leave of the winding up court;

(e) regarding the alleged loan of RM161,200 (from seventh defendant to ninth defendant):

(i) the seventh defendant admitted that the seventh defendant had not adduced any document to show that the amount of RM79,200 came from the seventh defendant. In fact, the plaintiffs' learned counsel showed to the seventh defendant the PLs first preliminary report, which stated that as at 31 July 2007, the ninth defendant's records only showed the first defendant who had advanced a sum of RM587,380 to the ninth defendant. Surprisingly, the seventh defendant agreed with the ninth defendant's records as stated in the PLs first preliminary report;

(ii) the seventh defendant disagreed with the plaintiffs' learned counsel that the alleged loan of RM161,200 (from seventh defendant to ninth defendant) would have been recorded in the ninth defendant's records. The seventh defendant further testified that if the alleged loan of RM161,200 (from seventh defendant to ninth defendant) was not recorded in the ninth defendant's records, the seventh defendant was not worried that the ninth defendant would not repay the alleged loan of RM161,200 (from seventh defendant to ninth defendant). There was also no possibility of the seventh defendant forgetting about the alleged loan of RM161,200 (from seventh defendant to ninth defendant) because the seventh defendant had a record of the seventh defendant's advances to the ninth defendant ('the alleged record) and the seventh defendant had furnished a copy of the alleged record to the ninth defendant; and

(iii) the seventh defendant agreed with the plaintiffs' learned counsel that if it was true that there was:

(1) the alleged loan of RM161,200 (from seventh defendant to ninth defendant); and

(2) re-payment of the alleged loan of RM161,200 (from seventh defendant to ninth defendant) by way of the three cheques

— the ninth defendant still owed RM1,200 to the seventh defendant ('alleged outstanding sum of RM1,200'). Despite the fact that the seventh defendant was aware the ninth defendant was a public listed company at the material time, the seventh defendant testified that the seventh defendant was not aware that any advance to a public listed company should be reflected in the public listed company's financial

records and reports. The seventh defendant confirmed that the seventh defendant did not file a suit against the ninth defendant to recover the alleged outstanding sum of RM1,200; and

(f) the seventh defendant informed this court that the seventh defendant's first drawn salary in 1990 was RM2,500 per month. The seventh defendant's last drawn salary was RM6,800 per month. When the plaintiffs' learned counsel put to the seventh defendant that based on the seventh defendant's salary, the alleged loan of RM161,200 (from the seventh defendant to the ninth defendant) could not be true, the seventh defendant explained that the seventh defendant had a business outside the ninth defendant whereby the seventh defendant obtained more than RM15,000 a month ('seventh defendant's alleged outside business').

[17] The seventh defendant clarified, among others, as follows in his re-examination:

(a) the seventh defendant did not file a suit against the ninth defendant to recover the alleged outstanding sum of RM1,200 because the seventh defendant was busy running his business in Alor Star;

(b) the seventh defendant claimed that for the last 15 years, the ninth defendant would advance money to the seventh defendant for expenses incurred by the seventh defendant for foreign workers and 'everything'. The seventh defendant would provide receipts for the ninth defendant to 'contra'. Sometimes, the ninth defendant would ask the seventh defendant for money and the seventh defendant would do so;

(c) the seventh defendant had no idea why the ninth defendant's records did not state that the seventh defendant was a creditor of the ninth defendant; and

(d) the seventh defendant testified that the seventh defendant could not adduce documentary evidence to prove the source of the alleged loan of RM161,200 (from seventh defendant to ninth defendant) because:

(i) the alleged loan of RM161,200 (from seventh defendant to ninth defendant) happened a long time ago, more than ten years ago; and

(ii) the seventh defendant went to his bank, CIMB Bank Bhd ('CIMB') but CIMB did not have records because 'it happened a long time ago'.

A E. WHETHER DEFENDANTS (INCLUDING THE SEVENTH DEFENDANT) HAD CONSPIRED TO INJURE THE PLAINTIFFS

[18] My understanding of case law is that there are two kinds of tort of conspiracy to injure, namely:

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(a) tort of conspiracy to injure by unlawful means; and

(b) tort of conspiracy to injure by lawful means.

I refer to the English Court of Appeal's judgment delivered by Nourse LJ (as he then was) in *Kuwait Oil Tanker Co SAK and another v Al Bader and others* [2000] 2 All ER (Comm) 271, at paras 107–108 (*Kuwait Oil Tanker Co*), as follows:

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> 107. *It is common ground that there are two types of actionable conspiracy, conspiracy to injure by lawful means and conspiracy to injure by unlawful means*. The first is sometimes described simply as a conspiracy to injure and the second as a conspiracy to use unlawful means (see eg Clerk and Lindsell on Torts (17th Ed, 1995) pp 1267–1268, paras 23–76). *In our view they are both conspiracies to injure and their ingredients are the same, with one crucial difference. In both cases there must be conspiracy to injure the claimant, but in the first case (in which the means employed would otherwise be lawful) the predominant purpose of the conspiracy must be to injure the claimant whereas in the second case, although the defendant must intend to injure the claimant, injury to the claimant need not be his predominant purpose*.
>
> 108. *We shall treat them as different torts, although, as it seems to us, they are better regarded as species of the same tort. It matters not. For present purposes we would define them as follows. (1) A conspiracy to injure by lawful means is actionable where the claimant proves that he has suffered loss or damage as a result of action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him, where the predominant purpose of the defendant is to injure the claimant. (2) A conspiracy to injure by unlawful means is actionable where the claimant proves that he has suffered loss or damage as a result of unlawful action taken pursuant to a combination or agreement between the defendant and another person or persons to injure him by unlawful means, whether or not it is the predominant purpose of the defendant to do so. We shall call them a 'lawful means conspiracy' and an 'unlawful means conspiracy' respectively*. (Emphasis added.)

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H **[19]** The above two kinds of tort of conspiracy to injure as explained in *Kuwait Oil Tanker Co* had been followed by Nallini Pathmanathan J (as she then was) in the High Court case of *Deepak Jaikishan a/l Jaikishhan Rewachand & Anor v Intrared Sdn Bhd & Anor* [2013] 7 MLJ 437, at para 100.

I **[20]** There are two Court of Appeal judgments regarding the tort of conspiracy to injure by unlawful means, namely:

(a) in *Renault SA v Inokom Corp Sdn Bhd & other appeals* [2010] 5 MLJ 394, at paras 30–34, KN Segara JCA decided as follows:

> [30] Tan Chong asserts, that based on the statement of claim, there is only one allegation made against Tan Chong — it is in relation to the Kangoo project. *Inokom and Quasar allege in the pleadings that Renault and Tan Chong had conspired with each other by unlawful means to injure Inokom and Quasar so as to deprive them the opportunity of developing the Kangoo project. The unlawful means used was allegedly a false and fraudulent representation on the part of Renault as to how much Inokom and Quasar ought to invest in order to develop the Kangoo project …*
>
> [31] Tan Chong maintains that there is no cause of action in the tort of conspiracy to injure and, that on the undisputed facts and on the facts as pleaded, the claim against Tan Chong is devoid of any substance, equivocal, lacking in precision, inconsistent and improbable in itself. We are unanimous and agree that this is a fit and proper case for the writ and statement of claim to be struck off as against Tan Chong.
>
> [32] *In regard to the tort of conspiracy, the following need to be satisfied at this interlocutory stage*:
>
> (a) *an agreement between two or more persons (that is an agreement between Tan Chong and others)*;
>
> (b) *an agreement for the purpose of injuring Inokom and Quasar*;
>
> (c) *that acts done in execution of that agreement resulted in damage to Inokom and Quasar*;
>
> (d) *damage is an essential element and where damage is not pleaded the statement of claim may be struck out*.
>
> (see *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ Rep 243).
>
> [33] *It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. 'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar wiil have to make for the Kangoo project*.
>
> [34] *It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement*. (Emphasis added.)

(b) Low Hop Bing JCA held as follows in *SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor* [2011] 4 MLJ 393, at paras 13–14:

> [13] *The plaintiffs, who desire the court to give judgment as to the legal right or liability, dependent on the existence of facts which he asserts in relation to the tort*

of conspiracy to defraud the plaintiffs, bear the burden of proving their case ...

[14] *The tort of conspiracy is not constituted by the conspiratorial agreement alone. For conspiracy to take place, there must also be an unlawful object, or, if not in itself unlawful, it must be brought about by unlawful means: see Davies v Thomas* [1920] 2 Ch 189 *per Warrington LJ, and Seah Siang Mong v Ong Ban Chai and another action* [1996] MLJU 484; [1998] 1 CLJ Supp 295 (HC) per Ghazali J (now FCJ). There must be a co-existence of an agreement with an overt act causing damage to the plaintiffs. Hence, this tort is complete only if the agreement is carried into effect, thereby causing damage to the plaintiffs. In order to succeed in a claim based on the tort of conspiracy, the plaintiffs must establish:

(a) *an agreement between two or more persons*;

(b) *for the purpose of injuring the plaintiff; and*

(c) *acts done in the execution of that agreement resulted in damage to the plaintiff: Marrinan v Vibart* [1962] 1 All ER 869 at p 871 *Salmon J; and Halsbury's Laws of England (4th Ed) Vol 45 at p 271, as applied by Ghazali J (now FCJ) in Seah Siang Mong*. (Emphasis added.)

[21] Based on my understanding of the above cases:

(a) the three elements of the tort of conspiracy to injure by unlawful means ('three elements'), are as follows:

(i) there must be proof of:

(1) an agreement; and/or

(2) a combination of efforts

of the conspirators to injure the plaintiff. Such an agreement or combination may be:

(A) formal or informal; or

(B) in writing or by word of mouth;

(ii) there are acts committed to execute the agreement or combination to injure the plaintiff;

(iii) the plaintiff has suffered damage due to acts done in execution of the agreement or combination to injure the plaintiff; and

(b) the tort of conspiracy to injure by lawful means has the three Elements and a fourth ingredient, namely there is a pre-dominant purpose or intention of the conspirators to injure the plaintiff.

[22] The RSOC had pleaded that the defendants (including the seventh defendant) had conspired, by unlawful or lawful means, to injure the plaintiffs. A

[23] It is clear that the plaintiffs have the legal burden under ss 101(1), (2) and 102 of the Evidence Act 1950 ('the EA') to prove the tort of conspiracy to injure, either by unlawful or lawful means, against the defendants (including the seventh defendant). In *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 5 MLJ 1; [2015] 5 AMR 497, at paras 48–53 (Sinnaiyah & Sons), the Federal Court in a judgment delivered by Richard Malanjum CJ (Sabah & Sarawak) held that an allegation of fraud, even if such an allegation concerns 'criminal fraud', need only be proven on a balance of probabilities and not beyond all reasonable doubt. Accordingly, based on *Sinnaiyah & Sons*, the plaintiffs are only required to discharge the legal burden to prove that the defendants (including the seventh defendant) have committed the tort of conspiracy to defraud the plaintiffs (tort of conspiracy to injure by illegal means) on a balance of probabilities. B C D

[24] Based on the evidence of PW1 and PW2:

(a) there is no evidence on a balance of probabilities to prove that the defendants (including the seventh defendant) have committed the tort of conspiracy to defraud the plaintiffs because there is no evidence regarding: E

(i) the existence of any agreement and/or a combination of efforts on the part of the defendants (including the seventh defendant) to defraud the plaintiffs. Nor is there any evidence to prove any agreement and/or a combination of efforts on the part of the defendants (including the seventh defendant) to injure the plaintiffs; *and/or* F

(ii) any act committed by the defendants (including the seventh defendant) to execute the agreement or combination to defraud or to injure the plaintiffs; and G

(b) as regards the tort of conspiracy to injure the plaintiffs by lawful means, the absence of the above two elements, in themselves, will mean that such a claim must fail. Furthermore, there is no proof on a balance of probabilities that the defendants (including the seventh defendant) have a pre-dominant purpose or intention to injure the plaintiffs. H I

F. WHETHER THE SEVENTH DEFENDANT WAS KNOWINGLY A PARTY TO CARRY ON THE NINTH DEFENDANT'S BUSINESS WITH INTENT TO DEFRAUD THE NINTH DEFENDANT'S CREDITORS

[25] Section 304 of the CA provides as follows:

304(1) Responsibility for fraudulent trading

If in the course of the winding up of a company or in any proceedings against a company *it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the Court on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do declare that any person who was knowingly a party to the carrying on of the business in that manner shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the Court directs*.

(2) Where a person has been convicted of an offence under subsection 303(3) in relation to the contracting of such a debt as is referred to in that section the Court, on the application of the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that the person shall be personally responsible without any limitation of liability for the payment of the whole or any part of that debt.

(3) When the Court makes any declaration pursuant to subsection (1) or (2), it may give such further directions as it thinks proper for the purpose of giving effect to that declaration, and in particular may make provision for making the liability of any person under the declaration a charge on any debt or obligation due from the company to him, or on any charge or any interest in any charge on any assets of the company held by or vested in him or any corporation or person on his behalf, or any person claiming as assignee from or through the person liable or any corporation or person acting on his behalf, and may from time to time make such further order as is necessary for the purpose of enforcing any charge imposed under this subsection.

(4) For the purpose of subsection (3) 'assignee' includes any person to whom or in whose favour by the directions of the person liable the debt, obligation, or charge was created, issued or transferred or the interest created, but does not include an assignee for valuable consideration, not including consideration by way of marriage, given in good faith and without notice of any of the matters on the ground of which the declaration is made.

(5) Where any business of a company is carried on with the intent or for the purpose mentioned in subsection (1) every person who was knowingly a party to the carrying on of the business with that intent or purpose shall be guilty of an offence against this Act.

Penalty: Imprisonment for three years or ten thousand ringgit.

(6) This section shall have effect notwithstanding that the person concerned is criminally liable apart from this section in respect of the matters on the ground of which the declaration is made.

(7) On the hearing of an application under subsection (1) or (2) the liquidator may himself give evidence or call witnesses.

(Emphasis added.)

[26] The RSOC had averred that the defendants (including the seventh defendant) had carried on the ninth defendant's business under s 304(1) of the CA with intent to defraud the plaintiffs who were the ninth defendant's creditors.

[27] My understanding on s 304(1) of the CA as interpreted by the relevant cases, is as follows:

(1) the following three categories of persons may apply under s 304(1) of the CA:

(a) the company's liquidator;

(b) the company's creditor; and/or

(c) the contributory of the company;

(2) proceedings under s 304(1) of the CA (s 304(1) of the CA Proceedings) may be commenced against a company:

(a) in the course of the winding up of the company; and/or

(b) by way of a suit;

(3) there is evidence that the company's business has been carried on:

(a) with intent to defraud the company's creditors;

(b) with intent to defraud the creditors of any other person; or

(c) for any fraudulent purpose.

In this judgment, I will describe the three above circumstances as the 'three limbs of fraudulent trading'. It is to be noted that the shoulder note to s 304 of the CA states 'Responsibility for fraudulent trading'.

I refer to the following cases which have construed the three limbs of fraudulent trading:

(i) in *Siow Yoon Keong v H Rosen Engineering BV* [2003] 4 MLJ 569, at p 580, Abdul Hamid Mohamad JCA (as he then was) delivered the following judgment of the Court of Appeal:

Next we come to the phrase 'with intend to defraud creditors ... or for any fraudulent purpose'. First, we would like to note that the phrase should be read

disjunctively even though on the facts of the case both limbs are relevant and applicable. (Emphasis added).

Based on *Siow Yoon Keong*, I am of the view that the three limbs of fraudulent trading should be construed disjunctively;

(ii) in the first Trial, Nallini Pathmanathan J (as she then was), at paras 36–42, followed Lord Hoffmann's judgment in the Hong Kong Court of Final Appeal (Hong Kong's apex court) in *Aktieselskabet Dansk Skibsfinansiering v Brothers and ors* [2001] 2 BCLC 324, at pp 330–334 ('Aktieselskabet'), as follows:

6. Dishonesty in fraudulent trading

The next point is that the judge misunderstood the notion of fraud in s 275(1) of the Companies Ordinance (Cap 32). This reads as follows:

> If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose, the court, on the application of the Official Receiver, or the liquidator or any creditor or contributory of the company, may, if it thinks proper so to do, declare that any persons who were knowingly parties to the carrying on of the business in manner aforesaid, shall be personally responsible, without any limitation of liability, for all or any of the debts or other liabilities of the company as the court may direct.

It is well established that the section requires proof that someone carried on the business of the company with a fraudulent intent and that the other directors sought to be held liable were knowingly party to his fraud. The judge dealt with and rejected a submission that the question of whether the business was being carried on with intent to defraud was an 'objective' matter. He held, correctly, that the question of whether the person carrying on the business was fraudulent was subjective in the sense that he personally must have been dishonest. He said at para 5.1.16:

> *Fraudulent intent must be established subjectively after a careful examination of all the evidence. Even in what appear to be water-tight cases, fraud may not be found — simply an unjustified albeit honest 'chasing of the rainbow'*.

and at para 5.1.24:

> It is not, I think, necessary to dwell overlong on dishonesty or to conduct a lengthy analysis of the many cases to which I was referred. There is really no dispute about the law. *The further a person departs from objective standards of honesty, the more likely it becomes that he is dishonest*.

Both of these statements seem to me impeccable and merely form a background to what the parties and the judge agreed was the critical issue, namely whether the directors honestly believed that sufficient support from WM would be forthcoming.

...

The criticism of the judge's understanding of the law is based upon his citation of the Australian case of *Hardie v Hanson* (1960) 105 CLR 451, from which the phrase about 'chasing the rainbow' was derived. This was a case in which the judge had held a director of a company carrying on a retailing business liable because, according to the decree, he had caused the company to continue to trade and incur liabilities 'without any reasonable prospect of being able to pay or provide payment therefor'. The High Court of Australia said that this was not enough. *The question was not whether there was a reasonable prospect of payment but whether the director was personally dishonest. Dixon CJ said (at 461) that although he had 'struggled on with the business after a time when in fairness to others and in wisdom' he should have wound it up, he had not been shown to be fraudulent. Kitto J said (at p 464) that 'although he was clearly unjustified in his chasing of the rainbow' he was not shown to have had any intent other than to try to carry the business through its difficulties*. Menzies J said (at p 467) that:

> *... even if the chances of payment of all creditors in full were so remote that it belonged to the realms of hope rather than belief, it seems to me that the fault, grievous though it may be, falls short of fraud unless it is coupled with something else, such as misrepresentation of the position or an intention to use goods purchased on credit for the purposes of dishonest gain, which gives it a fraudulent character*.

The Australian judge whose decision was reversed by the High Court had applied a dictum of Maugham J in *In re William C. Leitch Brothers, Limited* [1932] 2 Ch 71 at p 77:

> In my opinion I must hold with regard to the meaning of the phrase carrying on business 'with intent to defraud creditors' that, if a company continues to carry on business and to incur debts at a time when there is to the knowledge of the directors no reasonable prospect of the creditors ever receiving payment of those debts, it is, in general, a proper inference that the company is carrying on business with intent to defraud.

The High Court did not think that this was a very helpful generalisation. I am bound to say that I agree. The question of whether a person carrying on the business was dishonest must depend, as Barnett J said, upon an assessment of all the facts. In cases in which fraud is inferred, there is almost always, as Menzies J said, 'something else': a misrepresentation to creditors of the company's position or their prospects of payment or a dishonest intent to gain some personal advantage.

...

Whether the directors have been dishonest is a question of fact in each case. Whatever the validity of Maugham J's generalisation that directors who carry on business when they know there is no prospect of the creditors ever receiving payment have an intent to defraud, he certainly did not mean that they could never have such an intent in any other circumstances.

...

A Finally, Mr Purle submitted that Barnett J simply took too relaxed a view of the concept of honesty.

...

So, Mr Purle says, it is not enough that the directors were acting honestly according to their own lights. They should have acted according to the objective standard of what an honest person would have done in the circumstances. He said that, by this standard, the judge's other findings showed that they had lamentably failed. Le Pichon J, in her dissenting judgment, took much the same view. She cited a remark of Maugham J *In re Patrick And Lyon, Limited* [1933] Ch 786 at p 790 to the effect that dishonesty was something which 'according to current notions of fair trading among commercial men, (involves) real moral blame'. That is, of course, true, but it seems to me that Le Pichon J may have transposed the dictum into a proposition that conduct which involved real moral blame amounted to dishonesty for the purposes of s 275.

...

While I quite accept that a defendant cannot be allowed to shelter behind some private standard of honesty not shared by the community, I think that there is a danger in expressing that proposition by invoking the concept of the hypothetical decent honest man. The danger is that because decent honest people also tend to behave reasonably, considerately and so forth, there may be a temptation to treat shortcomings in these respects as a failure to comply with the necessary objective standard. It seems to me much safer, at least in the context of an allegation of fraud, to concentrate upon the actual defendants and simply ask whether they have been dishonest. Judges or juries seldom have any conceptual difficulty in knowing what is meant by dishonesty. (Emphasis added.)

Section 275(1) of the Companies Ordinance of Hong Kong is substantially similar to our s 304(1) of the CA. The Decision of first trial has been affirmed in the Court of Appeal's judgment (first defendant) given by Abang Iskandar bin Abang Hashim JCA;

(iii) according to the Court of Appeal's judgment (first defendant):

(1) the Court of Appeal's judgment (first defendant) had followed *Siow Yoon Keong, Sinnaiyah & Sons* and *Aktieselskabet*; and

(2) to prove the three limbs of fraudulent trading, there need not be evidence of a scheme to defraud the company's creditors. A single act of doing the company's business to defraud the company's creditors, is sufficient in itself to trigger the application of s 304(1) of the CA (please see para 42 of the Court of Appeal's judgment (first defendant)); and

(iv) the plaintiffs need only prove one or more of the three limbs of fraudulent trading on a balance of probabilities – please see the Federal Court's judgment in *Sinnaiyah & Sons* and the Court of Appeal's

judgment *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd and another appeal* [2014] 1 MLJ 49 (first defendant);

(4) the defendant is knowingly a party to the carrying on of the company's business which constitutes any one or more of the three limbs of fraudulent trading; and

(5) the court hearing the s 304(1) of the CA proceedings has a discretion to declare any person (not necessarily a director, employee or shareholder of the company) who is knowingly a party to any one or more of the three limbs of fraudulent trading, to be personally liable without limitation of liability for any debt or liability of the company. Section 304(1) of the CA is a statutory exception to the limited liability of a company as embodied in s 16(5) of the CA.

[28] In *Siow Yoon Keong*, at p 578, Abdul Hamid Mohamad JCA (as he then was) held as follows:

> *We are of the view that the issue is the interpretation of s 304(1) of the CA and whether the facts of this case fall within the meaning of that subsection. It does not matter whether the relationship between Rosen and Ventura is one of principal and agent or otherwise. It does not matter whether the section carries both civil and criminal liabilities. It does not matter whether there are other remedies. The question is whether on the facts, the case falls within the ambit of s 304(1) of the CA or not and whether this is a fit and proper case for the learned Judicial Commissioner (as he then was) to make the declaration that he did.* (Emphasis added).

It is clear from *Siow Yoon Keong* that s 304(1) of the CA is a civil remedy which is independent of:

(a) all other civil relief; and

(b) criminal sanction provided in s 304(5) of the CA or any other law (please see s 304(6) of the CA).

[29] In this case:

(a) there is no doubt that the plaintiffs are the ninth defendant's creditors — the decision of first trial as affirmed in para 37 of the Court of Appeal's judgment (first defendant). As such, I have no hesitation to reject the seventh defendant's contention that only the liquidators and not the plaintiffs, have the locus standi to file a s 304(1) of the CA proceedings against the seventh defendant;

(b) this suit is a s 304(1) of the CA proceedings; and

(c) the Court of Appeal's judgment (first defendant) affirmed the decision of first trial that there was sufficient evidence to prove the first defendant's dishonesty and intention to defraud the ninth defendant's creditors as early as 2006, if not 2004, when the first defendant told the

second defendant that it was the first defendant's intention to make it appear that the ninth defendant was seen as a going concern to the ninth defendant's creditors when in fact the ninth defendant was not (please see paras 36, 41, 45 and 49 of the Court of Appeal's judgment (first defendant)). In fact, the Court of Appeal's judgment (first defendant) in para 60, had affirmed the decision of first trial that the first defendant had dissipated the ninth defendant's assets when the first defendant had caused the ninth defendant to issue the three cheques on 11 September 2007 after the appointment of PLs and the three cheques were encashed on 12 September 2007, resulting in a further channelling of the ninth defendant's funds in the sum of RM160,000 to the seventh defendant.

[30] Notwithstanding the above para 29, I am not satisfied that the plaintiffs have proven on a balance of probabilities that the seventh defendant was knowingly a party to the carrying on of the ninth defendant's business which constituted one or more of three limbs of fraudulent trading. Firstly, there was no evidence that the seventh defendant was involved in the carrying on of the ninth defendant's business. The seventh defendant did not deal with any of the ninth defendant's customers, creditors, suppliers and bankers. This is understandable because the seventh defendant was not a director of the ninth defendant's BOD and was only the ninth defendant's HR manager.

[31] In the plaintiffs' written submission, the plaintiffs' learned counsel contended that the seventh defendant had issued the three memoranda to the ninth defendants' employees which stated that the factory would be closed for specified periods of time and the ninth defendants' employees would be paid their salaries in full during those periods. According to the plaintiffs, the three memoranda deceived the plaintiffs and the seventh defendant should be liable to the plaintiffs under s 304(1) of the CA. With respect, I am not able to accept this submission. The three memoranda did not pertain to any dealing between the ninth defendant and the ninth defendant's creditors. More importantly, the three memoranda had been issued by the seventh defendant after the PLs had taken possession of the factory pursuant to the second order appointing PLs on 23 April 2008. If the three memoranda were false and/or misleading, the PLs would have taken action against the seventh defendant but no such action had been instituted by the PLs.

[32] For reasons which I will explain later in this judgment, in respect of the encashment of the three cheques, the seventh defendant had acted dishonestly vis-a-vis the seventh defendant's employer, namely the ninth defendant. However, the seventh defendant did not act dishonestly in respect of the three cheques, vis-a-vis the ninth defendant's creditors so as to attract the application of s 304(1) of the CA. In the circumstances, I am constrained to dismiss the plaintiff's claim against the seventh defendant based on s 304(1) of the CA.

G. WHETHER THE SEVENTH DEFENDANT HAD UNLAWFULLY DISSIPATED THE NINTH DEFENDANT'S ASSETS BY ENCASHING THREE CHEQUES (DISSIPATION ISSUE)

G(1). Whether the plaintiffs could raise dissipation issue at second trial

[33] Subparagraph 16.21(iii) RSOC had clearly pleaded, among others, that the encashment of the three cheques constituted possible CBT. Subparagraph 6.5 of the plaintiffs' reply to the seventh defendant's defence ('plaintiffs' reply'), expressly alleged that the seventh defendant had siphoned the total sum of the three cheques, namely RM160,000 ('RM160,000 sum'). In view of such pleadings by the plaintiffs, I am unable to accede to the seventh defendant's contention that the plaintiffs have failed to plead the dissipation issue.

[34] The plaintiffs and the seventh defendant had agreed to certain issues to be tried in the second trial ('agreed issues to be tried'). Order 34 r 2(2)(k) of the RC provides for the court to direct at pre-trial case management for parties to file issues to be tried. The agreed issues to be tried, in the second issue, posed the question to this court on whether the RM160,000 sum had been siphoned out from the ninth defendant by the seventh defendant and if so, whether the seventh defendant should be personally liable for the RM160,000 sum. Accordingly, the seventh defendant is estopped by the agreed issues to be tried from asserting that the plaintiffs are barred from raising the dissipation issue in the second trial.

G(2). Credibility of PW1 and seventh defendant

[35] There is a conflict between the oral evidence of PW1 and the seventh defendant in respect of what had happened on 12 September 2007. Hence, I will now decide which witness is credible and whether his testimony should be given weight and preference.

[36] I find that PW1 is a credible witness. This is because PW1's oral evidence that there is very little production of yarn by the ninth defendant in April 2007, has been corroborated by the following undisputed evidence:

(a) for the ninth defendant's financial year ending 31 December 2006, the ninth defendant had suffered a nett loss of RM19,016,215 and that the ninth defendant's current liabilities were RM101,414,548;

(b) on 31 May 2007, the ninth defendant had announced the ninth defendant's quarterly financial report to Bursa which showed that the ninth defendant had suffered a loss of RM4,424,000 for the first quarter ending 31 March 2007; and

(c) on 6 June 2007, the ninth defendant was listed under PN 17.

[37] I do not find the seventh defendant to be a truthful witness. My reasons are as follows:

(a) the alleged loan of RM161,200 (from seventh defendant to ninth defendant) had been credibly rebutted by contemporaneous documentary evidence in the form of the three PV's of the ninth defendant which clearly stated the three cheques were advances from the ninth defendant to the seventh defendant. The particulars of the three cheques, namely the cheque numbers and their amounts, had been expressly stated in the three PV's. The seventh defendant did not allege that the three PV's had been forged or fabricated against the seventh defendant. If the three PV's had been forged or fabricated against the seventh defendant, the seventh defendant would have lodged a police report in respect of the three PV's, especially when the seventh defendant is legally represented and had the benefit of legal advice.

I rely on Siti Norma Yaakob JCA's (as she then was) judgment in the Court of Appeal case of *Guan Teik Sdn Bhd v Haji Mohd Noor Haji Yakob & Ors* [2000] 4 MLJ 433; [2000] 4 CLJ 324, at p 439/p 330, as follows:

> *In cases where conflicting evidence are presented before a court, it is the duty of the court not only to weigh such evidence on a balance of probabilities but it is also encumbent [sic] upon the court to look at all the surrounding factors and to weigh and evaluate contemporaneous documents that may tend to establish the truth or otherwise of a given fact. In this instance the learned trial judge discredited the evidence of the appellant, accepted the evidence of the respondents wholeheartedly and disregarded the contemporaneous documents totally. We say that he had erred as he had failed to direct his mind as to the probative effect of the contemporaneous documents. He should, after accepting the respondents' evidence, weighed it against the contemporaneous documents and evaluate whether such documents support the respondents' oral testimony. We say that this evaluation exercise is most crucial for it must be remembered that the respondents were testifying to events that happened eighteen years ago whilst the contemporaneous documents speak of matters then existing at the time such documents, were issued*. (Emphasis added.)

Based on *Guan Teik Sdn Bhd*, I attach great weight to the three PV's;

(b) I cannot give any credence to the seventh defendant's oral evidence that the seventh defendant has encashed the three cheques in the morning of 12 September 2007. This is because the EON's debit advice dated 12 September 2007 has clearly stated that the subject matter of the third cheque has been debited from the ninth defendant's bank account with EON at 3.37pm, 12 September 2007. Once again, based on *Guan Teik Sdn Bhd*, I should give preference to the contemporaneous documentary

evidence in the form of the EON's debit advice dated 12 September 2007. More importantly, the EON's debit advice dated 12 September 2007 is a piece of independent evidence;

(c) the conduct of the parties is relevant under s 8(2) of the Evidence Act 1950 ('the EA'). In *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229 at p 234, Chang Min Tat FCJ delivered the following judgment in the Federal Court:

> *For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings*. (Emphasis added.)

The seventh defendant's conduct at the material time is inconsistent with the seventh defendant's averment regarding the alleged loan of RM161,200 (from seventh defendant to ninth defendant). If the alleged loan of RM161,200 (from seventh defendant to ninth defendant) were true:

(i) when the seventh defendant knew about the appointment of the PLs or when the seventh defendant returned to the ninth defendant's factory on 12 September 2007 (after the PLs had taken possession of the factory), the seventh defendant should have informed the PLs about the alleged loan of RM161,200 (from seventh defendant to ninth defendant). The seventh defendant had not only failed to inform the PLs regarding the alleged loan of RM161,200 (from seventh defendant to ninth defendant) but the seventh defendant had even 'disappeared' after the seventh defendant's encashment of the three cheques;

(ii) the seventh defendant would be reasonably expected to demand for the ninth defendant to repay the alleged outstanding sum of RM1,200. No such demand had ever been made by the seventh defendant. In view of the ninth defendant's winding up, the seventh defendant should have filed a POD with the liquidators regarding the alleged outstanding sum of RM1,200; and

(iii) the seventh defendant claimed that the ninth defendant had not paid the seventh defendant's salary and EPF contributions (seventh defendant's salary and EPF contribution claim) (just like what had happened between the ninth defendant and the plaintiffs). However, the seventh defendant did not demand or file a POD with the liquidators in respect of the seventh defendant's salary and EPF contribution claim. Such a conduct by the seventh defendant supports the inference that the three cheques actually constitute a preferential payment by the ninth defendant to the seventh defendant to satisfy the seventh defendant's

salary and EPF contribution claim. I will discuss subsequently in this judgment regarding the seventh defendant's encashment of the three cheques as an undue preference under s 293 of the CA;

(d) in WSSD1, the seventh defendant testified that the seventh defendant had been asked by the first defendant to affirm the false SD regarding GPSB's assets. The seventh defendant claimed that the seventh defendant did not know that such a SD was false. WSSD1 did not however disclose that the seventh defendant was a director of GPSB at the material time.

I cannot accept that any reasonable director of a company can affirm a SD regarding the company's assets without knowing the truth or otherwise of the contents of the SD. If a company director does not actually know about the company's assets, the director should not have affirmed any SD regarding the company's assets According to s 3 of the Statutory Declarations Act 1960 ('the SDA'), a SD made under the SDA shall be deemed to be a declaration referred to in ss 199 and 200 of the Penal Code ('the PC'). If a person affirms a SD which is false, and which he or she either knows or believes to be false or does not believe to be true, touching any point material to the object for which the SD is made or used, he or she shall be punished in the same manner as if he or she has given false evidence (as provided in s 193 of the PC). Sections 193 and 199 of the PC provide as follows:

> *193 Punishment for false evidence*
>
> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and *whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine*.
>
> *199 False statement made in any declaration which is by law receivable as evidence*
>
> *Whoever, in any declaration made or subscribed by him*, which declaration any Court, or any public servant or other person, is bound or authorised by law to receive as evidence of any fact, *makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, touching any point material to the object for which the declaration is made or used, shall be punished in the same manner as if he gave false evidence*. (Emphasis added.)

Even if the seventh defendant has not been prosecuted in respect of the false SD regarding GPSB's assets, the mere fact that the seventh defendant as GPSB's director has affirmed the false SD regarding GPSB's

assets without knowing as a fact whether GPSB actually owns assets, greatly undermines the seventh defendant's credibility;

(e) the seventh defendant's claim that the seventh defendant had advanced money to the ninth defendant for 15 years, was not borne out by the financial records and reports of the ninth defendant. It is to be noted that the ninth defendant is a public listed company which is subject to a stringent financial reporting regime imposed by the Securities Commission and Bursa;

(f) s 114(g) of the EA provides as follows:

> 114 *The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case*.
>
> ILLUSTRATIONS
>
> *The court may presume —*
>
> ...
>
> (g) *that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it*; ... (Emphasis added.)

An adverse inference under s 114(g) of the EA should be drawn against the seventh defendant for not adducing the following documentary evidence to prove that the seventh defendant had the financial means to make the alleged loan of RM161,200 (from seventh defendant to ninth defendant):

(i) documents regarding the seventh defendant's income from the seventh defendant's alleged outside business, such as the annual declarations of the seventh defendant's income to the Director General of Inland Revenue ('DGIR') and the DGIR's annual assessments of the seventh defendant's income tax;

(ii) the seventh defendant's bank statements from CIMB to show that the seventh defendant had the necessary funds to advance to the ninth defendant. I find it difficult to believe that CIMB did not have records of the seventh defendant's own bank account. If this is the case, the seventh defendant would have complained to Bank Negara Malaysia regarding CIMB's negligence in not keeping proper records of the seventh defendant's bank account, especially when the seventh defendant had the benefit of legal advice in this case; and

(iii) the alleged record was never produced by the seventh defendant. There had been pre-trial case management before the second trial and yet, the seventh defendant did not serve the alleged record on the plaintiffs' solicitors under O 34 r 2(2)(c) of the RC so that the alleged record could

form part of the common bundle of documents to be used at the second trial. Order 34 r 2(2)(c) of the RC provides as follows:

> 2(2) *At a pre-trial case management, the Court may consider any matter including the possibility of settlement of all or any of the issues in the action or proceedings and require the parties to furnish the Court with such information as it thinks fit, and the appropriate orders and directions that should be made to secure the just, expeditious and economical disposal of the action or proceedings, including —*
>
> ...
>
> (c) *the period within which the parties are to file a bundle of all documents that will be relied on or referred to in the course of the trial by any party*, including documents referred to in the witness statement of a witness; ... (Emphasis added).

I am mindful that the plaintiffs solely bear the legal burden under ss 101(1), (2) and 102 of the EA to prove that the seventh defendant has dishonestly dissipated the ninth defendant's assets by encashing the three cheques. The seventh defendant has no legal onus to prove his defence. Nonetheless, in civil cases (not criminal matters), the court has a discretion to draw an adverse inference under s 114(g) of the EA against the seventh defendant for the seventh defendant's failure to adduce relevant documentary evidence as explained above. I rely on the following appellate cases:

(i) the Supreme Court's judgment given by Hashim Yeop Sani CJ (Malaya) in *Guthrie Sdn Bhd v Trans-Malaysian Leasing Corp Bhd* [1991] 1 MLJ 33, at pp 34–35;

(ii) Haidar JCA's (as he then was) judgment in the Court of Appeal case of *Chan Yoke Lain (administrator of the estate of Chong Yoke Fah, deceased) v Pacific & Orient Insurance Co Sdn Bhd* [1999] 1 MLJ 303, at pp 308–309; and

(iii) Gopal Sri Ram's (as he then was) decision in the Court of Appeal in *Subry bin Hamid v Husaini bin Tan Sri Ikhwan* [2006] 6 MLJ 229; [2006] 5 AMR 644, at pp 652–653.

In view of the aforesaid reasons, this court is constrained to hold that the seventh defendant has suppressed the above documentary evidence as explained by the Supreme Court's judgment given by Mohd Azmi SCJ in *Munusamy v Public Prosecutor* [1987] 1 MLJ 492, at pp 493–494; and

(g) the seventh defendant had not adduced any documentary evidence to prove:

(i) the seventh defendant's alleged outside business whereby the seventh defendant had allegedly earned more than RM15,000 a month. I will

discuss later regarding the legality of the seventh defendant's alleged outside business; and

(ii) the seventh defendant was actually running a business in Alor Star and that was why that the seventh defendant could not institute an action against the ninth defendant to recover the alleged outstanding sum of RM1,200.

In view of the seventh defendant's failure to produce the above documentary evidence to substantiate the above allegations, an adverse inference under s 114(g) of the EA is thus made against the seventh defendant in respect of the above documentary evidence.

G(3). The seventh defendant had dishonestly dissipated ninth defendant's assets by encashing three cheques

[38] Based on *Sinnaiyah & Sons*, the plaintiffs need only prove on a balance of probabilities that the seventh defendant has dishonestly misappropriated the ninth defendant's funds by encashing the three cheques.

[39] As explained in the above part G(2), I have found as a fact that PW1 is creditworthy while the seventh defendant is economical with the truth. As such, I have no hesitation to accept PW1's testimony that approximately 9–9.15am on 12 September 2007, PW1 has heard the seventh defendant informing the ninth defendant's BOD that the ninth defendant has been served with the first order appointing PLs. Once the seventh defendant had actual knowledge of the appointment of the PLs in the morning of 12 September 2007, the seventh defendant should not have encashed the three cheques in the evening of the same day. During cross-examination, the seventh defendant had admitted that if the seventh defendant was aware of the appointment of the PLs, the seventh defendant should not have encashed the three cheques.

[40] I am satisfied on a balance of probabilities that in view of the seventh defendant's actual knowledge of the appointment of the PLs in the morning of 12 September 2007, by encashing the three cheques in the evening of the very same day, the seventh defendant had acted dishonestly. Such a finding of fact regarding the seventh defendant's dishonesty in encashing the three cheques is also supported by the following circumstantial evidence:

(a) after encashing the three cheques, the seventh defendant returned to the ninth defendant's office and knew about the appointment of the PLs and yet, the seventh defendant did not inform the PLs about the three cheques and the seventh defendant's encashment of the three cheques.

The seventh defendant's concealment of these material facts from the PLs, clearly evidenced the seventh defendant's dishonest intention in this case;

(b) as explained above, the three cheques were actually a preferential payment by the ninth defendant for the seventh defendant's salary and EPF contribution. As such, there was motive under s 8(1) of the EA for the seventh defendant's dishonest encashment of the three cheques;

(c) the seventh defendant had worked with the ninth defendant since 2 June 1990. It is inconceivable for a HR manager such as the seventh defendant not to have actual knowledge of the ninth defendant's PN 17 status on 6 June 2007. Furthermore, according to PW1, as early as April 2007, there was very little production of yarn by the factory. Any reasonable HR manager in the seventh defendant's position would have known as late as 6 June 2007 (if not earlier in April 2007) that the ninth defendant was financially distressed and any cash cheque, let alone three cash cheques, issued by the ninth defendant would be an attempt to dissipate unlawfully the ninth defendant's assets;

(d) the three cheques had been issued on 11 September 2007 by the ninth defendant. The seventh defendant encashed the three cheques the very next day on 12 September 2007 after the PLs had taken possession of the factory. Such an unholy haste, could not be co-incidental and evidenced the seventh defendant's dishonest intention to dissipate the ninth defendant's assets;

(e) there was no reason for the ninth defendant to issue not one but three cash cheques to the seventh defendant. If the alleged loan of RM161,200 (from seventh defendant to ninth defendant) was genuine and if the ninth defendant truly intended to pay the alleged loan of RM161,200 (from seventh defendant to ninth defendant), it would be sufficient for the ninth defendant to issue only one crossed cheque in the name of the seventh defendant. The fact that three cash cheques were issued to the seventh defendant, clearly showed that both the seventh and ninth defendants had the dishonest intention to conceal the true nature of the payments made by way of the three cheques, namely the ninth defendant had actually made a preferential payment to the seventh defendant for the seventh defendant's salary and EPF contribution; and

(f) for reasons to be given later in this judgment, the seventh defendant had breached his employee's implied contractual duty of good faith and fidelity owed to the ninth defendant by having the seventh defendant's alleged outside business.

[41] In the above part G(2), I have given reasons for rejecting the alleged loan of RM161,200 (from seventh defendant to ninth defendant). Accordingly,

there is no justification for the seventh defendant to encash the three cheque and by encashing the three cheques, the seventh defendant had dishonestly misappropriated the ninth defendant's funds under s 403 of the PC. I reproduce s 403 of the PC as follows:

> *403 Dishonest misappropriation of property*
>
> *Whoever dishonestly misappropriates* or converts to his own use, or causes any other person to dispose of, *any property, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine*. (Emphasis added.)

[42] I am aware that the first order appointing PLs has been set aside on 19 September 2007. As early as the first order appointing PLs, PLs had been appointed to safeguard the assets of the ninth defendant from being dissipated. Hence, the significance of the seventh defendant's actual knowledge of when the PLs had taken possession of the ninth defendant's factory. The setting aside of the first order appointing PLs, in my view, does not detract from the dishonest dissipation of the ninth defendant's funds by way of the seventh defendant's encashment of the three cheques. I will discuss subsequently in this judgment, the effect of the setting aside of the first order appointing PLs and the winding up order made in the second winding up petition.

[43] In view of the seventh defendant's dishonest misappropriation of the RM160,000 sum by encashing the three cheques, the seventh defendant is legally bound to make restitution of the RM160,000 sum to the ninth defendant. This is understandable as the RM160,000 sum belongs to the ninth defendant and not to the plaintiffs. There is another reason why the RM160,000 sum cannot be paid by the seventh defendant to the plaintiffs. This is because if the RM160,000 sum is paid to the plaintiffs, such a payment constitutes an undue preference in the plaintiffs' favour under s 293 of the CA.

G(4). Did the seventh defendant breach fiduciary and/or contractual duties in respect of the seventh defendant's alleged outside business?

[44] In respect of the seventh defendant's alleged outside business, I will first discuss whether the seventh defendant as an employee of the ninth defendant owes duties of good faith and fidelity to the ninth defendant under the seventh defendant's employment contract. The following cases from Singapore have clearly held that the seventh defendant as the ninth defendant's HR manager owes an implied contractual duty of good faith and fidelity to the ninth defendant:

(a) in *Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad and another* [2004] 1 SLR 234, at para 61, Tay Yong Kwang J held as follows in the Singapore High Court:

A

> [61] *There can be no denying that all employees are expected to serve their employers diligently, honestly and loyally. What this duty translates into factually depends on the circumstances such as the nature of the work. Employees should not be engaged in other business or employment during their working hours without the approval of their employers*. They should certainly not be diverting business opportunities that they got wind of only because of their employment status and during the subsistence of the employment, whether or not such information amounted to confidential information within the meaning of the law. (Emphasis added.)

B

C

(b) Andrew Phang Boon Leong JCA delivered the following judgment of the Singapore Court of Appeal in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 5 SLR 663, at para 193:

D

> *The implied duty of good faith and fidelity owed by an employee to an employer at common law*
>
> [193] *It is trite law that there is an implied term in the employer's favour that the employee will serve the employer with good faith and fidelity, and that he or she (the employee) will also use reasonable care and skill in the performance of his or her duties pursuant to the employment contract* (see the oft-cited English decisions of *Robb v Green* [1895] 2 QB 315 and *Hivac Limited v Park Royal Scientific Instruments Limited and others* [1946] Ch 169 ; reference may also be made, in the local context, to the Singapore High Court decision of *Asiawerks Global Investment Group Pte Ltd v Ismail bin Syed Ahmad and another* [2004] 1 SLR 234 at p 61. (Emphasis added.)

E

F

[45] The seventh defendant's employment contract with the ninth defendant (seventh defendant's employment contract) had not been adduced at the second trial. Nonetheless, as explained by the above cases, the seventh defendant owed implied duties of good faith and fidelity to the ninth defendant as the ninth defendant's employee, not to conduct the seventh defendant's alleged outside business. This is especially so when the seventh defendant claimed to have earned more than RM15,000 a month from the seventh defendant's alleged outside business when the seventh defendant only earned RM6,800 per month as a full-time HR manager for the ninth defendant. Furthermore, the ninth defendant is a public listed company and the ninth defendant's shareholders would not have been pleased to find out that the ninth defendant's full-time employees have 'outside business' which pays more than double the monthly salaries of the ninth defendant's employees. This explains my reluctance to accept as true the seventh defendant's alleged outside business.

G

H

I

[46] I will now discuss whether the seventh defendant as an employee of the ninth defendant owes fiduciary duties to the ninth defendant. The following cases are relevant:

(a) Lord Woolf MR decided as follows in the English Court of Appeal case of *Attorney-General v Blake Jonathan Cape Ltd (third party)* [1998] 2 WLR 805, at p 814:

> *There is more than one category of fiduciary relationship, and the different categories possess different characteristics and attract different kinds of fiduciary obligation. The most important of these is the relationship of trust and confidence, which arises whenever one party undertakes to act in the interests of another or places himself in a position where he is obliged to act in the interests of another. The relationship between employer and employee is of this character*. (Emphasis added.)

(b) in *Smile Inc Dental Surgeons Pte Ltd v Lui Andrew Stewart* [2012] 4 SLR 308, at paras 49–55 ('Smile Inc Dental Surgeons'), Andrew Phang Boon Leong JCA decided as follows in the Singapore Court of Appeal:

> *The implied term of the duty of good faith and fidelity*
>
> [49] As we made clear in *Man Financial* (at p 193):
>
> > It is trite law that there is an implied term in the employer's favour that the employee will serve the employer with good faith and fidelity, and that he or she (the employee) will also use reasonable care and skill in the performance of his or her duties pursuant to the employment contract. (Emphasis added.)
>
> [50] *Whilst this proposition of law is an ostensibly simple one, there appeared, unfortunately, to have been some blurring of the lines between the duty of good faith and fidelity on the one hand and a fiduciary duty on the other*, which was noted in the court below (see the judgment, especially at p 226). *In our view, there is indeed a distinction between the two duties — a distinction to which our attention now turns*.
>
> *The distinction between a fiduciary duty and the duty of good faith and fidelity*
>
> [51] *It is clear that both the duty of good faith and fidelity and fiduciary duty may arise from the same employer-employee relationship. However, it must be borne in mind that the bases of these duties are entirely different*.
>
> [52] In the English High Court decision of *Nottingham University v Fishel* [2000] IRLR 471 ('Nottingham University'), for example, the defendant was a clinical embryologist employed by the plaintiff as an academic staff member, as well as a scientific director of the latter's in vitro fertilisation unit. The defendant did outside work without consent from the plaintiff and the plaintiff sued for an account of profits based on breach of the alleged fiduciary duty owed by the defendant. Elias J made the following pertinent observations (at pp 86–97):
>
> > [86] [T]here has been a tendency to describe someone as a fiduciary simply as a means of enabling the courts to impose the equitable remedies ...
> >
> > [87] *It is important to recognise that the mere fact that Dr Fishel is an*

employee does not mean that he owes the range of fiduciary duties referred to above. It is true that in Blake Lord Woolf … said that the employer-employee relationship is a fiduciary one. But plainly the court was not thereby intending to indicate that the whole range of fiduciary obligations was engaged in every employment relationship. This would be revolutionary indeed, transforming the contract of employment beyond all recognition and transmuting contractual duties into fiduciary ones. In my opinion, the court was merely indicating that circumstances may arise in the context of an employment relationship, or arising out of it, which, when they occur, will place the employee in the position of a fiduciary.

...

[90] *[T]he essence of the employment relationship is not typically fiduciary at all. Its purpose is not to place the employee in a position where he is obliged to pursue his employer's interests at the expense of his own. The relationship is a contractual one and the powers imposed on the employee are conferred by the employer himself. The employee's freedom of action is regulated by the contract, the scope of his powers is determined by the terms (express or implied) of the contract, and as a consequence the employer can exercise (or at least he can place himself in a position where he has the opportunity to exercise) considerable control over the employee's decision-making powers*.

[91] *This is not to say that fiduciary duties cannot arise out of the employment relationship itself. But they arise not as a result of the mere fact that there is an employment relationship. Rather they result from the fact that within a particular contractual relationship there are specific contractual obligations which the employee has undertaken which have placed him in a situation where equity imposes these rigorous duties in addition to the contractual obligations. Where this occurs, the scope of the fiduciary obligations both arises out of, and is circumscribed by, the contractual terms; it is circumscribed because equity cannot alter the terms of the contract validly undertaken …*

[92] The problem of identifying the scope of any fiduciary duties arising out of the relationship is particularly acute in the case of employees. This is because of the use of potentially ambiguous terminology in describing an employee's obligations, which use may prove a trap for the unwary. There are many cases which have recognised the existence of the employee's duty of good faith, or loyalty, or the mutual duty of trust and confidence — concepts which tend to shade into one another.

...

[96] *Accordingly, in analysing the employment cases in this field, care must be taken not automatically to equate the duties of good faith and loyalty, or trust and confidence, with fiduciary obligations*. Very often in such cases the court has simply been concerned with the question whether the employee's conduct has been such as to justify summary dismissal, and there has been no need to decide whether the duties infringed, properly analysed, are contractual or fiduciary obligations. As a consequence, the two are sometimes wrongly treated as identical ...

> [97] *Accordingly, in determining whether a fiduciary relationship arises in the context of an employment relationship, it is necessary to identify with care the particular duties undertaken by the employee, and to ask whether in all the circumstances he has placed himself in a position where he must act solely in the interests of his employer. It is only once those duties have been identified that it is possible to determine whether any fiduciary duty has been breached* ...

[53] In that case, Elias J held that in so far as the defendant's own work outside was concerned, he could not have been considered a fiduciary even though his position was akin to that of a senior employee with the title of director. Similarly, in *Nagase Singapore Pte Ltd v Ching Kai Huat* [2007] 3 SLR(R) 265, Singapore High Court found that the employees concerned did not owe a special duty of 'single minded or exclusive loyalty' to the employers even though they 'were members of the middle management of the plaintiff' and they had 'authority to negotiate contracts on behalf of the company or to authorise the payment of invoices' (at [29]). In the Court of Appeal of British Columbia decision of *Mitchell v Paxton Forest Products Inc* [2002] BCCA 532, a sales manager whose responsibilities included developing and maintaining the defendant's customer base, marketing its products, setting prices, negotiating terms of sale and dealing with defendant's suppliers was not considered a fiduciary. Newbury JA stated (at p 6):

> I would tend, if pressed, to say Mr Mitchell was not 'senior management', since he was not entrusted with powers and influence which could materially affect the company's interests. He had managerial responsibilities with regard to sales, but could not approve a purchase over $1,000, had only one clerk reporting to him and could not hire or fire employees.

[54] *This is in contradistinction to the oft-cited Canadian Supreme Court decision of Canadian Aero Service Ltd v O'Malley (1973) 40 DLR (3rd) 371, where a president and executive vice-president of a company were held to be fiduciaries of the company*. Laskin J stated (at 381):

> *They were 'top management' and not mere employees whose duty to their employer, unless enlarged by contract, consisted only of respect for trade secrets and for confidentiality of customer lists. Theirs was a larger, more exacting duty which, unless modified by statute or by contract (and there is nothing of this sort here), was similar to that owed to a corporate employer of its directors*.

[55] Applying the principles set out above to the present appeal in general and to the context of the Employment Contract between the Appellant and Respondent in particular, the Respondent was not in a position where he owed fiduciary duties to the Appellant. He was merely an associate dental surgeon who had not been entrusted with the authority to make any management decisions for the Appellant. Neither was he permitted to make corporate decisions binding the Appellant, unlike the cases in which 'senior management' was involved. On the contrary, under the terms of the Employment Contract, the Respondent was obliged to 'work at any of the Practices operated by Smile Inc. Dental Surgeons Pte. Ltd. at the instructions

A of the Directors' and the Respondent also undertook that he 'shall be responsible and take instructions from the Directors and shall carry out duties as may be assigned to him. (Emphasis added.)

B **[47]** Based on *Smile Inc Dental Surgeons, Nottingham University, Nagase Singapore Pte Ltd* and *Canadian Aero Service Ltd*, an employee owes fiduciary duties to his or her employer in the following circumstances:

(a) when the employment contract imposes specific contractual obligations on the employee which place the employee in a situation where Equity C imposes fiduciary duties on the employee;

(b) when the employee owes a special duty of 'single minded or exclusive loyalty' to the employer; and/or

(c) when the employee is in the 'top management' of the employer with D duties similar to those owed by company directors.

I must add that the above circumstances where an employee owes fiduciary duties to his or her employer, are not exhaustive. The following considerations E are relevant in ascertaining whether an employee owes fiduciary duties to his or her employer:

(i) the position of the employee in the organisation, structure and hierarchy of the employer, namely how senior is the employee; and

F (ii) the nature and extent of the duties, functions and responsibilities of the employee.

[48] I am of the view that the seventh defendant owes no fiduciary duty to the ninth defendant because:

G (a) the seventh defendant was not in the 'top management' of the ninth defendant. Nor was the seventh defendant a senior employee of the ninth defendant. This was due to the fact that the seventh defendant was only the ninth defendant's HR manager; and

H (b) the seventh defendant was not involved in the management and running of the ninth defendant. Considering the nature and extent of the duties, functions and responsibilities of the seventh defendant as the HR manager for the ninth defendant:

I (i) there was no specific contractual obligation on the seventh defendant which placed the seventh defendant in a situation where equity would impose fiduciary duties on the seventh defendant;

(ii) the seventh defendant did not owe a special duty of 'single minded or exclusive loyalty' to the ninth defendant; and

(iii) the seventh defendant did not owe any duty to the ninth defendant which was similar to those owed by the ninth defendant's directors.

H. EFFECT OF WINDING UP ORDER

H(1). Can the plaintiffs rely on ss 223 and 293 of the CA (effect of winding up issue)?

[49] The plaintiffs have relied on ss 223 and 293 of the CA which provide as follows:

> 223 *Avoidance of dispositions of property, etc*
>
> *Any disposition of the property of the company* including things in action and any transfer of shares or alteration in the status of the members of the company made *after the commencement of the winding up by the Court shall unless the Court otherwise orders be void*.
>
> *Undue preference*
>
> (1) *Any* transfer, mortgage, delivery of goods, *payment*, execution *or other act relating to property made or done by* or against *a company which, had it been made or done by* or against *an individual, would in his bankruptcy under the law of bankruptcy be void or voidable shall, in the event of the company being wound up, be void or voidable in like manner*.
>
> (2) *For the purposes of this section the date which corresponds with the date of presentation of the bankruptcy petition in the case of an individual shall be —*
>
> (a) *in the case of a winding up by the Court —*
>
> (i) *the date of the presentation of the petition*; or
>
> (ii) where before the presentation of the petition a resolution has been passed by the company for voluntary winding up the date upon which the resolution to wind up the company voluntarily, is passed,
>
> whichever is the earlier; and
>
> (b) in the case of a voluntary winding up the date upon which the winding up is deemed by this Act to have commenced.
>
> (3) Any transfer or assignment by a company of all its property to trustees for the benefit of all its creditors shall be void. (Emphasis added.)

[50] Section 293(1) and (2) of the CA refer to the Bankruptcy Act 1967 ('the BA'). In the context of s 292 of the CA, s 53 of the BA is pertinent and reads as follows:

> *53 Avoidance of preference in certain cases*

(1) *Every* conveyance or transfer of property or charge thereon made, *every payment made*, every obligation incurred and every judicial proceeding *taken or suffered by any person unable to pay his debts, as they become due, from his own money in favour of any creditor or any person in trust for any creditor shall be deemed to have given such creditor a preference over other creditors if the person making, taking, paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking, paying or suffering the same and every such act shall be deemed fraudulent and void as against the Director General of Insolvency*.

(2) *This section shall not affect the rights of any person making title in good faith and for valuable consideration through or under a creditor of the bankrupt*.

(3) For the purposes of this section 'creditor' includes a surety or guarantor for the debt due to that creditor. (Emphasis added.)

[51] The seventh defendant's learned counsel had contended that the plaintiffs had failed to plead the effect of winding up issue. With respect, I am not able to agree because paras 16.5, 16.9–16.12, 16.21(i) to (iv) and 17 RSOC have pleaded in great detail the effect of winding up issue. As explained above, sub-para 16.21(iii) RSOC had pleaded, among others, that the encashment of the three cheques constituted possible CBT. Paragraphs 4, 6 and 6.1–6.6 of the plaintiffs' reply have alluded in detail to the effect of winding up issue. Under O 18 r 11 of the RC, a party may raise any point of law in his or her pleading. It is not mandatory under O 18 of the RC for the plaintiffs to plead specifically ss 223 and 293 of the CA. In the agreed issues to be tried, the following questions had b een agreed by the plaintiffs and the seventh defendant to be decided at the second trial:

(a) whether the issue of the three cheques amounted to a breach of the first order appointing PLs although such an order had been subsequently set aside; and

(b) whether the RM160,000 sum was available for payment to the plaintiffs.

[52] In the Court of Appeal's judgment ('the eighth defendant'), David Wong Dak Wah JCA set aside the decision of first trial only against the eighth defendant on the following grounds:

(a) the plaintiffs had not pleaded the matters which the High Court had ordered against the eighth defendant; and

(b) the liquidators should have taken action against the eighth defendant.

[53] As the plaintiffs have sufficiently pleaded the effect of winding up issue in the RSOC and the plaintiffs' reply, the seventh defendant cannot rely on the Court of Appeal's judgment (eighth defendant).

[54] I am of the respectful view that ss 223 and 293 of the CA have effect by operation of law. As such, even if there is no suit or application by the liquidator to invalidate a particular transaction, if that transaction is void under ss 223 and 293 of the CA or for that matter, under any provision of written law, the transaction nevertheless remains void. Furthermore, Parliament has not required in ss 223 and 293 of the CA, either expressly or by necessary implication, that any transaction can only be invalidated by an action or application by the liquidator. In contra-distinction to ss 223 and 293 of the CA, s 304(1) of the CA expressly requires a s 304(1) proceeding to be filed by the liquidator, the company's creditor or contributory (please see the above sub-para 27(1)).

H(2). The plaintiffs cannot rely on first winding up petition

[55] The winding up order had been made in the second winding up petition. As such, the plaintiffs cannot rely on the first winding up petition. As explained above, the first order appointing PLs had been set aside. For reasons expressed above, the first order appointing PLs is relevant to show the need to preserve the ninth defendant's assets for the benefit of the ninth defendant's unsecured creditors in the winding up of the ninth defendant.

H(3). The seventh defendant's encashment of three cheques is not caught by s 223 of the CA

[56] Upon the making of the winding up order, s 219(2) of the CA deems that the winding up order shall commence on *19 October 2007*, the date of the presentation of the second winding up petition — please see Siti Norma Yaakob JCA's (as she then was) judgment in the Court of Appeal case of *Kredin Sdn Bhd v Development & Commercial Bank Bhd* [1995] 3 MLJ 304, at p 307.

[57] The seventh defendant encashed the three cheques on 12 September 2007, before the date of presentation of the second winding up petition (19 October 2007). As such, s 223 of the CA cannot apply to the RM160,000 sum.

H(4). The seventh defendant's encashment of three cheques constituted an undue preference in the seventh defendant's favour

[58] I rely on the following cases regarding the application of s 293 of the CA:

(a) in *Lian Keow Sdn Bhd (in liquidation) & Anor v Overseas Credit Finance (M) Sdn Bhd & Ors* [1988] 2 MLJ 449, at pp 452–455 (*Lian Keow Sdn Bhd*), Seah SCJ delivered the following judgment of the Supreme Court:

In my opinion, s 53 of the Bankruptcy Act 1967 *is imported into a winding up proceeding of a company by* s 293(1) of the Companies Act 1965 ...

In short, the rules of bankruptcy as to fraudulent preference are applied to the winding up of the company by the court by s 293(1) of the Companies Act 1965.

I think it appropriate at this stage to refer to what Bacon VC said about this subject. Speaking of s 164 of the English Companies Act 1862 which is the forerunner of s 320 of the English Companies Act 1948 (ours is s 293 of the Companies Act 1965) in the case of *Willmott v London Celluloid Co* (1886) 31 Ch D 425 Bacon VC said (at p 434):

> The 164th section, however, relates only to a case similar in all respects to that which would arise in bankruptcy, and the very words of the 164th section put this beyond the possibility of doubt. This Act of Parliament, dealing as it does with an insolvent company, that is, a bankrupt company, and making provision for the benefit of the creditors, of the shareholders, and of all other persons interested, declares by the 164th section that a fraudulent preference shall be set aside and held to be void for the benefit of the creditors — that is, the creditors in the winding up. No other persons have any right to raise the question of fraudulent preference ...

Earlier on, Bacon VC observed that:

> In bankruptcy, and only in bankruptcy as far as I know, the doctrine of fraudulent preference found a place in the jurisprudence of this country. A winding up is, in point of fact, a bankruptcy, and the doctrine is also applicable to a winding up. ...

In short, s 53(1) *renders void as against the official assignee a transfer of property, by a person who is unable to pay his debts as they become due from his own money, in favour of a creditor as this transfer shall be deemed as giving that creditor a fraudulent preference over the other creditors if that person is adjudged a bankrupt within six months after the making of the transfers ...*

As regards the phrase 'every transfer of property made by any person' used in s 53(1), *think these words 'any person' ought to be given a liberal interpretation*. In my opinion, the transfer of the property may be signed by the bankrupt as well as by his trustee or agent on his behalf provided always that the beneficial interest in the property is vested in the bankrupt at the material time. Otherwise, the bankrupt could easily defeat the just claims of the official assignee by registering his property in the name of a third party ...

In Re Chong Khian (Bankrupt) Kuching High Court No K45 of 1978 I held that the date of making of the fraudulent preference in favour of a creditor over other creditors under s 53(1) of the Bankruptcy Act 1967 *the date of the registration of the said transfer at the Land Registry office. It is correct to point out that I was construing a provision of the Sarawak Land Code in that case. However, since the Sarawak Land Code and the (National Land Code) are substantially based on the Torrens system of Australia, I would adopt the same construction in construing the (National Land Code) in Peninsular Malaysia. Applying this rule of interpretation, it followed that all the three transfers of the first, second and third*

portions of the estate to the first respondent were made in November 1978. In other words, transfer of landed property was made when registered under the (National Land Code) and not when it was executed by the parties …

In my opinion, the expression 'within six months after the date of making (the transfers)' in s 53(1) *capable of being construed to mean: (a) before the expiration of six months after the date of making the transfers or (b) during the period of six months after the date of making the transfers*.

I would prefer construction (a) which would have the effect of preventing any mischief which a bankrupt might be thinking of doing between the period of the presentation of the bankruptcy petition and the making of the adjudication order by the court.

I agree with the contention of learned counsel for the second appellant that the words 'in favour of any creditor' means 'in favour of any person claiming to be a creditor'. (Emphasis added.)

(b) in *Sime Diamond Leasing (M) Sdn Bhd v JB Precision Moulding Industries Sdn Bhd (in liquidation)* [1998] 4 MLJ 569, at p 579 ('Sime Diamond Leasing'), Edgar Joseph Jr FCJ gave the following judgment of the Federal Court:

To take the matter further, *it is clear law that the Court has no power to make an order setting aside payments and transfers made in the run-up to bankruptcy in favour of a particular creditor which were designed to prefer him over other creditors unless the following five conditions are satisfied*:

(1) *that the transaction in question took place within six months prior to the commencement of winding up;*

(2) *that it satisfies the description of one of the types of transaction mentioned in* s 53(1) of the Bankruptcy Act;

(3) *that it took place at a time when the company was insolvent;*

(4) *that the person in whose favour the transaction was effected stood in the relation of creditor to the Company; and*

(5) *the effect of the transaction was to confer on that person a preference, priority or advantage over other creditors in the winding up*.

…

The object of the rules of bankruptcy as to fraudulent preferences is to prevent a creditor from obtaining for himself an unfair advantage at the expense of other creditors by concluding a transaction with the company during what has been called the twilight period which precedes winding up. (Emphasis added.)

(c) Menzies J in the High Court of Australia held as follows in *Commercial Banking Co of Sydney Ltd v George Hudsons Pty Ltd (in liquidation)* (1973) 131 CLR 605; [1973] 2 ALR 1, at p 5:

It is a deeply rooted principle of company law that, when liquidation has commenced, one creditor should not be assisted by the court to improve its position

vis-a-vis other creditors. (Emphasis added.)

The High Court of Australia is the apex court in that country.

[59] I am of the view that the seventh defendant's encashment of the three cheques constitutes an undue preference in the seventh defendant's favour under s 293(1) of the CA and s 293(2)(a)(i) of the CA read with s 53(1) of the BA. This decision is premised on the following reasons:

(a) the second winding up petition had been presented on *19 October 2007*. According to ss 219(2), 293(1) and 293(2)(a)(i) of the CA read with s 53(1) of the BA as interpreted in *Sime Diamond Leasing*, the six month period for the application of the undue preference rule, would commence from *19 April 2007*. As the seventh defendant encashed the three cheques on *12 September 2007*, the seventh defendant's encashment of the three cheques would be caught by the undue preference rule;

(b) the three cheques fall within the term 'payment' in s 293(1) of the CA;

(c) as explained above, the seventh defendant's encashment of the three cheques took place at a time when the ninth defendant was insolvent;

(d) the seventh defendant was a creditor of the ninth defendant in view of the seventh defendant's salary and EPF contribution claim;

(e) the seventh defendant's encashment of the three cheques would confer on the seventh defendant a preference, priority or advantage over all other unsecured creditors of the ninth defendant in the ninth defendant's winding up (including the plaintiffs); and

(f) for reasons elaborated in the above parts G2 and G3, the seventh defendant had dishonestly dissipated the ninth defendant's funds and could not therefore rely on the 'bona fide purchaser for valuable consideration' exception in s 53(2) of the BA. In any event, I find as a fact that for reasons explained in the above parts G2 and G3 that the seventh defendant has failed to discharge the legal onus under s 106 of the EA to prove on a balance of probabilities that the seventh defendant has acted in good faith in respect of the seventh defendant's encashment of the three cheques. Section 106 of the EA provides as follows:

> *When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him. (Emphasis added.)*

The following appellate cases have held that a party claiming to be a *bona fide* purchaser for valuable consideration, has the legal burden to prove such a claim:

(i) the judgment of Suffian FCJ (as he then was) in the Federal Court case of *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224, at p 227;

(ii) Zaki Azmi FCJ's judgment in the Federal Court in *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1, at p 8; [2010] 2 CLJ 269, at p 280; and

(iii) the judgment of Raus Sharif JCA (as he then was) in the Court of Appeal case of *Au Meng Nam & Anor v Ung Yak Chew & Ors* [2007] 5 MLJ 136 at pp 156–157; [2007] 4 CLJ 526, at pp 554–555.

I. CAN COURT ORDER THE SEVENTH DEFENDANT TO RETURN RM160,000 SUM TO LIQUIDATORS?

[60] As the three cheques constitutes an undue preference in the seventh defendant's favour under ss 293(1) of the CA and 293(2)(a)(i) of the CA read with s 53(1) of the BA, the seventh defendant is legally bound to return the RM160,000 sum to the liquidators. As explained in the above para 43, the RM160,000 sum cannot be returned by the seventh defendant to the plaintiffs as this will contravene the undue preference rule.

[61] The seventh defendant's learned counsel had submitted that the RSOC did not contain a prayer for the seventh defendant to pay the RM160,000 sum to the liquidators. With respect, I am not able to accede to this contention because prayer No 8 RSOC has prayed for 'Further Order and/or other relief which this Honourable Court may deem fit and fair in the circumstances of this case' ('general prayer for relief'). The following appellate cases have held that the court may resort to the general prayer for relief:

(a) in *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, at p 160; [1982] CLJ (Rep) 190 at p 198, Salleh Abas FJ (as he then was) decided as follows in the Federal Court:

> From these two paragraphs of the statement of claim it is obvious that the respondent's solicitors treated the claim for loss of earnings as falling into two categories — (a) pre-trial loss, which they described it as 'loss of earnings' and (b) future loss of earnings, which they referred to as 'prospective loss of earnings.' But instead of pleading the pre-trial loss of earnings or 'loss of earnings' as they described it as an item under special damages, they erroneously pleaded it as an item under general damages. *This is purely a technical mistake, which in our view did not in any way affect the substance or prejudice the appellant — see* O 2 (Effect of Non-Compliance) of the Rules of the High Court 1980. *We cannot see how the respondent should be deprived of his right by a purely technical error on the part of his solicitors, who were not up-to-date with this aspect of legal technicalities. In any case prayer (e) in para (7), 'Any other relief which this honourable court deem fit to grant' must not be treated as a mere ornament to pleadings devoid of any meaning. We think that this prayer and the prayer for 'loss of earning' in para 5(a) should entitle the court to*

make such an assessment. (Emphasis added.)

(b) in the Court of Appeal case of *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261 at pp 301–302; [1996] 2 CLJ 771 at pp 814–815, Gopal Sri Ram JCA (as he then was) held as follows:

> *In his statement of claim, the appellant has also prayed for 'further or other relief as this Honorable Court thinks fit'. In Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, *160, a prayer in a statement of claim read 'Any other relief which this Honourable Court deem fit to grant'. Salleh Abas FJ (as he then was) said that this prayer 'must not be treated as a mere ornament to pleadings devoid of any meaning'.*
>
> *I am of the view that the same may be said of the like prayer in the present case. This court should, in my judgement, award the appellant such relief as is appropriate in the circumstances of the case. In arriving at this conclusion, I have not overlooked the decision in Mokhtar v Arumugam* [1959] 1 MLJ 232 *(CA), where the following statement of principle from the judgement of Fry J in Cargill v Bower* (1878) 10 Ch D 502, at p 508 was applied:
>
> > *You cannot, under a general prayer for further relief, obtain any relief inconsistent with that relief which is expressly asked for.*
>
> *As it happens, there is, in the present case, no inconsistency between the relief which I propose to award to the appellant and the other relief he has expressly claimed*. (Emphasis added.)

(c) Zainun Ali JCA (as she then was) gave the following majority judgment in the Court of Appeal in *Pentadbir Tanah Daerah, Pontian & Ors v Ossons Ventures Sdn Bhd* [2009] 6 MLJ 182 at pp 191–192; [2009] 6 CLJ 713 at pp 723–724:

> [28] *Though the prayers in the statement of claim did not specifically pray for the declaration as made by the High Court, the High Court had power to make the declaration because* O 14A r 2 *the court to 'make such order or judgment as it thinks just' upon determination of the question of construction of a document arising in the cause or matter. The order which may be made under* O 14A *is not restricted to the prayers in the statement of claim.*
>
> [29] *Further, in fairness to the respondent, prayer (18) in the statement of claim did contain a general prayer which had been upheld by the Federal Court to be effective in allowing courts to make such order as may be necessary to serve the ends of justice. Prayer (18) reads: Lain-lain perintah yang difikirkan suai manfaat oleh mahkamah yang mulia ini.*
>
> [30] In *Lim Eng Kay v Jaafar Mohamed Said* [1982] 2 MLJ 156; [1982] 2 CLJ 298; [1982] CLJ (Rep) 190, *the plaintiff there had failed to plead pretrial loss of earnings as special damages, However, the Federal Court held that the prayer for such 'other relief which the court deems fit to grant' was sufficient to enable the court to make an award of loss of earnings to the plaintiff …*
>
> ...

[31] *The declaration made by the High Court pursuant to* O 14A *not out of the blue. As pointed out above, the salient facts relating to the declaration were pleaded in paras 5, 20, 30 and 31 of the statement of claim. It was not something that took the appellants by surprise*. (Emphasis added.)

[62] Based on the above cases, it is just and proper for this court to order the seventh defendant to return the RM160,000 sum to the liquidators pursuant to the general prayer for relief. If otherwise, the undue preference rule will be rendered nugatory in this case. Worse still, the seventh defendant will be unjustly enriched by the RM160,000 sum. As explained above, the RSOC and the plaintiffs' reply have pleaded in great detail on the effect of winding up issue. As such, the seventh defendant cannot claim to be caught by surprise by the plaintiffs' prayer for the seventh defendant to pay the RM160,000 sum to the liquidators. I do not find that an order for the seventh defendant to return the RM160,000 sum to the liquidators, to be inconsistent with the other prayers in the RSOC.

J. INTEREST, PRE-JUDGMENT AND POST-JUDGMENT, SHOULD BE AWARDED AGAINST THE SEVENTH DEFENDANT

[63] Section 11 of the Civil Law Act 1956 ('the CLA') and O 42 r 12 of the RC provide as follows:

11 Power of Courts to award interest on debts and damages

In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section —

(1) shall authorize the giving of interest upon interest;

(2) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(3) shall affect the damages recoverable for the dishonour of a bill of exchange.

Interest on judgment debts

Order 42 rule 12 Subject to rule 12A, *except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines, such interest to be calculated from the date of judgment until the judgment is satisfied*. (Emphasis added.)

[64] In *Lim Eng Kay*, at pp 200–202, the Federal Court awarded pre-judgment interest as follows:

The ordering of interest to be included in a sum awarded for damages is a judicial discretion. Section 11 of the Civil Law Act 1956 *(Malaysia Act 67) gives a fairly wide discretion to the court to order interest on a sum adjudged by the Court in cases where a claimant succeeds in proceedings for the recovery of debts or damages*. English equivalent to our s 11 of the Civil Law Act 1956 s 3(1) of the Law Reform (Miscellaneous Provisions) Act 1934. But this section was repealed and replaced by s 22 of the Administration of Justice Act 1969 which came into effect on 1 January 1970. The change in the law simply means that the Court in England is now obliged, instead of being at its discretion, to award interest; but the principles as to how and in what manner interest is awarded remain the same (per Lord Denning MR in *Jefford and another v Gee* [1970] 1 All ER 1202). *Thus although in England interest is compulsory but because the principles by which the Court awards interest are not changed the result is very much the same as before and therefore similar to the position obtaining in our law. Prior to the passing of the Law Reform (Miscellaneous Provisions) Act 1934, under common law the Court had always had discretion to award interest as a compensation for a party who has been deprived of the use of its money to which it is legally entitled. The enactment of the judicial discretion by the statute simply gives statutory effect thereto, one of which is that it is not necessary for a plaintiff to claim interest in his pleadings as the Court can award interest without any claim being made in the pleadings. (Riches v Westminster Bank Ltd* [1943] 2 All ER 725). (Emphasis added.)

[65] In view of the seventh defendant's dishonest dissipation of the RM160,000 sum, I exercise my discretion:

(a) under s 11 of the CLA to award pre-judgment interest at the rate of 5%pa on the RM160,000 sum from 12 September 2007 (the date of the seventh defendant's encashment of the three cheques) until 7 December 2015, the date of the oral decision for the second trial; and

(b) to award post-judgment interest pursuant to O 42 r 12 of the RC at the rate of 5%pa on the RM160,000 sum from 7 December 2015 until the date of full payment of the RM160,000 sum.

K. COURT'S ORDER

[66] Premised on the above reasons, this court makes the following orders:

(a) the seventh defendant shall return the RM160,000 sum to the liquidators;

(b) the seventh defendant shall pay to the liquidators interest at the rate of 5%pa on the RM160,000 sum from 12 September 2007 until the date of full payment of the RM160,000 sum; and

(c) costs of the second trial shall be paid by the seventh defendant to the plaintiffs.

D7 ordered to return RM160,000 to liquidators of D9 with interest thereon at 5%pa from 12 September 2007 until date of full payment.

Reported by Ashok Kumar